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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1969

No. 227

CITY OF AUDUBON PARK, KENTUCKY, and
BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. AMSHOFF and DR. BURTON M. HEINE, - - - - - Petitioners,

versus

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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TABLE OF CONTENTS.

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2–4
STATUTE INVOLVED	4
STATEMENT OF THE CASE	4–6
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	6–19
I. Summary Judgment Improperly Entered	6–9
II. Failure of the Lower Courts to Make a Complete Declaration on Issues Raised by City of Audubon Park in Its Counter Declaration Was Error	10–14
III. The City of Audubon Park Has the Right to Raise the Issue of Illegality of Present Operations Over the City of Audubon Park From a Taking of Property Without Compensation Standpoint and to Raise Such Issue Both on the Behalf of Individual Residents and on Behalf of the City Itself as to Property Actually Owned (Park Property, Roads) By the City of Audubon Park	14–18
IV. 49 U.S.C., §1301, Et Seq. Does Not Deprive City of Audubon Park of Its Health and Safety Police Powers	18–19
CONCLUSION	19–20
APPENDIX "A"	21–25
Judgment	21–23
Opinion—Filed March 14, 1969	23–25

CITATIONS.

	PAGE
49 CJS §386 Judgment, p. 3219	7
Rogers v. Peabody Coal Co., CA 6, 342 F. 2d 749	7
F.A.R. Liquidating Corp. v. Brownell, CA 3, 209 F. 2d 375	8
Palmer v. Chamberlin, CA 5, 191 F. 2d 532	8
Free v. Bland, 369 U. S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180	8
Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458	8
American Airlines, Inc., et al. v. Town of Hempstead, et al., 272 F. Supp. 226 (June 15, 1966)	11
All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 106 F. Supp. 521 (July 1, 1952)	11
All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 201 F. 2d 273 (C.A. 2 Jan. 7, 1953)	11
All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 111 F. Supp. 677 (Apr. 10, 1953)	11
All American Airways, Inc., et al. v. Elderd, Mayor, et al., 209 F. 2d 247 (C.A. 2, Jan. 4, 1954)	11
Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 132 F. Supp. 871 (June 27, 1955)	11
Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 238 F. 2d 812 (C.A. 2, Dec. 13, 1956)	11
Public Service Commission of Utah, et al. v. Wycoff Co., 344 U. S. 237, 73 S. Ct. 236, 96 L. Ed. 1368	13
Section 12 Uniform Act	13
Anderson Actions for Declaratory Judgment, Vol. I, page 520, §232	13–14
Alabama State Federation of Labor, et al. v. McAdory, et al., 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384, p. 462	14
Constitution of the United States, Amendment 5, Amendment 14, §1	14–15
Constitution of Kentucky, §1, Subsection 5, §13 and §242	15

PAGE

City of Louisville v. President and Trustees of the Univerity of Louisville, Ky., 15 B. Mon. 642, 675 (1855) 17

29 C.J.S. 868 §196 17

Nichols Eminent Domain, Vol. 2, page 345, §5.9 17–18

United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1945) 18

Griggs v. Allegheny County, 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) 18

Thornbury v. The Port of Portland, Ore., 376 P. 2d 100 18

Bowling Green-Warren County Airport Board v. Long, Ky., 364 S. W. 2d 167 18

STATUTES.

PAGE

49 U.S.C. Sec. 1301 . . . . . 4, 6, 15, 18

IN THE

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No. _____

CITY OF AUDUBON PARK, KENTUCKY, and
BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. AMSHOFF and DR. BURTON M. HEINE, - - - *Petitioners,*

v.

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - *Respondents.*

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioner, City of Audubon Park, Kentucky, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on March 14, 1969.

CITATIONS TO OPINIONS BELOW.

There was no opinion rendered by the District Court. Findings of Fact and Conclusions of Law are printed in Appendix "R" 54a-62a.* The judgment of the District Court is unreported and is printed in full in Appendix "A" hereto, *infra,* Appendix "A" 21-23. There was no opinion of the Circuit Court of Appeals for the Sixth Circuit. An Order was entered by the Court on March 14, 1969 affirming the judgment of the District Court and said Order appears in the certified Record on Petition for Writ of Certiorari and is printed in Appendix "A" hereto, *infra,* App. "A" 23-25. Said Order is not reported.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on March 14, 1969, *infra,* App. "A" 23-25. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Were factual issues adequately developed and summary judgment proper?

2. Does the City of Audubon Park, Kentucky, have any police power for protection of health, safety

*Reference to pages of record certified to this Court by the Clerk, United States Court of Appeals for the Sixth Circuit, will be to the Appendix of Petitioner filed in said Court and will be designated by "R" followed by the appropriate page numbers in said Appendix.

and welfare of its inhabitants relative to air flights over its boundaries or has all such power been vested in or preempted by the F.A.A.?

3. If the F.A.A. has failed to establish any health, safety or welfare standards relative to flights over the City, is the City entitled to no judicial relief?

4. If the F.A.A. has established inadequate standards is the City entitled to no judicial relief?

5. If the F.A.A. has arbitrarily failed to establish standards in this instance comparable to those established in similar operations is the City entitled to no judicial relief?

6. In a declaratory action should a complete declaration of all rights be made?

7. Does the City have the right to raise the issue of illegality (and voidness of authority) of present air-flight operations over the City from a taking of property without compensation standpoint on behalf of the residents of the City (Trustees are also individually residents of City.)?

8. Does the City have the right to raise the issue of illegality (and voidness of authority) of present air-flight operations over the City from a taking of property without compensation standpoint on its own behalf as to property (Parks, Roads) actually owned by the City?

9. Was the City of Audubon Park, Kentucky attempting by its legislative enactment to regulate interstate commerce or to protect the health and safety of its inhabitants?

10. Does Federal preemption of air transportation field carry with it a preemption of local police powers relative to the health and safety of the local community?

STATUTE INVOLVED.

The statute involved is 49 *U.S.C.* Section 1301, *et seq.*

STATEMENT OF THE CASE.

As a summary judgment was entered at a very early stage, there is a dearth of factual matter contained in the record. Actually the entire record is based upon pleadings and the two affidavits of Mr. Hedges and Mr. Julliard.

Basically the controversy arose out of the following factual situation, low and continuous flights of aircraft over the City of Audubon Park with increasing frequency and attendant health and safety hazards. The City of Audubon Park was established in 1908 and Standiford Field came into existence in the 1940's. These two entities are probably less than one mile apart. The Board of Trustees of the City of Audubon Park have had various meetings with the Standiford Field authorities but apart from wining and dining, inspections and some promised relief, no results have been accomplished. The residents as well as the Board of Trustees of the City of Audubon Park have believed that the health, safety and welfare of the inhabitants of the City were being seriously jeopardized. Accordingly after over one year of intensive study and

meeting with Air Board authorities, it was deemed necessary by the Board of Trustees of the City of Audubon Park that an ordinance to secure the health, safety and welfare of the residents was the only available means of securing such relief. Accordingly the ordinance in question (Ordinance No. 4, Series 1967, Exhibit B) was adopted and became effective on November 21, 1967. This ordinance with certain exceptions provided that it shall be unlawful to operate aircraft over the City of Audubon Park at a height of less than 750 feet.

The Respondents instituted a declaratory action seeking to adjudge this ordinance void, arguing that under Federal Aviation Administration (hereinafter referred to as F.A.A.) regulations they have the right to fly aircraft over the furthermost part of Audubon Park at levels of 145 feet and at the City's boundaries closest to the airport at 84 feet. Petitioners will offer proof that flights are regularly made at altitudes lower than these. Respondents claim to have a right to fly at this level under F.A.A. regulations which they say have granted them a "flight easement" for these purposes and at these levels. Petitioners contend that the health and safety of the inhabitants are in dire jeopardy (there is no proof to the contrary); that no precautions have been established by the F.A.A. in regard to flights over the City of Audubon Park as have been done in similar locales elsewhere; that in effect there are no safety or health regulations in effect for the City of Audubon Park; that erroneous and inapplicable regulations are sought to be applied;

that any preemption as to air transportation does not carry with it a preemption of local health and safety standards and also that the alleged air easement is void in that such constitutes a taking of property without compensation.

REASONS FOR GRANTING THE WRIT.

Conflict between air and ground rights are continuing to become more acute and numerous. Health and safety measures are basically the function of the local governmental unit. A definite determination of local governmental units' obligations to its inhabitants should be declared and extent of preemption of 49 *U.S.C.* §1301, *et seq.* made known. Specifically question of whether 49 *U.S.C.* §1301, *et seq.* divests local governmental unit of all health and safety powers and leaves such body for practical purposes judicially defenseless should be clearly determined.

ARGUMENT.

I.

Summary Judgment Improperly Entered.

The Petitioners (hereinafter referred to as City of Audubon Park) are not interested in a reversal for reversal's sake, but actually are primarily interested in relief sought under points relating to their substantive rights. However, we can never get to substantive rights if an improper summary judgment is entered. To take this first question first, it is believed that the factual issues have not been developed to the

extent required by our judicial rules for the entry of a summary judgment. The issues were not, as is so frequently expressed, "ripe" for such determination on the record before the Court. There are factual issues which are tied in with other demands for relief also discussed under Point II but it seems that even without the later tie-in points hereinafter raised, the summary judgment is improper. This is for the obvious reasons that the factual issues have not been even dimly developed, the present decision being based solely upon affidavits of Mr. Julliard and Mr. Hedges.

The rule relative to summary judgment is generally stated along the lines that the moving party cannot succeed unless the facts conceded show a right of judgment with such clarity as to leave no room for controversy, and show effectively that the adverse party cannot prevail under any circumstances.

The rule is stated in 49 *CJS* §386 *Judgment,* p. 3219 as follows:

> "The power given to grant a summary judgment must be exercised with care, and not extended beyond its just limits, and before a party is entitled to the benefit of such a statutory remedy, he should bring himself squarely within the spirit and letter of the statute, and everything pertaining to the entry of such a judgment must be done strictly according to the provisions which authorize it. The remedy is to be administered in the furtherance of justice."

A recent case from this Circuit again stating these principles is *Rogers* v. *Peabody Coal Co.,* CA 6, 342 F. 2d 749.

The case of *F.A.R. Liquidating Corp.* v. *Brownell,* CA 3, 209 F. 2d 375 brings out the point that Affidavits filed in support of a motion for summary judgment may be considered for purposes of ascertaining whether an issue of fact is presented, but cannot be used as a basis for deciding the fact issue.

The Court in *Palmer* v. *Chamberlin,* CA 5, 191 F. 2d 532, held that it should refuse to grant a summary judgment where the decision of the question of law depends upon an inquiry into the surrounding facts and circumstances, until the facts and circumstances have been sufficiently developed to give certainty to the Court of its correct determination of the question of law.

The Supreme Court in *Free* v. *Bland,* 369 U. S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 states:

> "Allegations which in some circumstances might have a bearing on the subject were controverted and therefore can only be resolved by a trial on the merits."

and in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458:

> "This rule (56(c)) authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . (and where) no genuine issue remained for trial . . . (for) the purpose of the rule is not to cut litigants off from their rights to trial by jury if they really have issues to try'."

Presently the record as to factual matters contains only the affidavits of the two men which contain generalized and evidently hoped for self-serving statements many of which would be excluded as irrelevant to the issues raised in this action. In addition there has been no opportunity to present contrary proof or the usual right of cross-examination.

There is no question that the record other than by pleadings is without evidence relative to the following basic facts: (a) The actual height of flights over the City of Audubon Park, (b) Noise involved, (c) Smoke and gaseous fumes involved, (d) Safety of inhabitants of the City of Audubon Park, (e) Health of said inhabitants, (f) General welfare of said inhabitants, (g) Protective measures relative to foregoing, (h) Adequacy of such protective measures, (j) Reasonableness of protective measures sought to be taken by City of Audubon Park.

City of Audubon Park contends that summary judgment is improper without inquiry and evidence as to each and all of these matters and judicial determination relative thereto. Authorities which we have cited *supra* are believed to be determinative on this point that summary judgment on this record was erroneously entered.

II.

Failure of the Lower Courts to Make a Complete Declaration on Issues Raised By City of Audubon Park in Its Counter Declaration Was Error.

Not only did we fail to have in the lower Courts factual inquiry into the Respondents' assertions contained in pleadings and the affidavits of the two affiants, but there was also a failure to inquire completely into the legality of and necessity for the protective ordinance in furtherance of such matters as the health, safety, and general welfare of the inhabitants of the local governmental unit. The record is devoid of any evidence on the part of Petitioners of the effect of the present flight patterns on the health and safety of the inhabitants of the City of Audubon Park.

It was specifically requested that the City's rights in this regard for the protection of its inhabitants be determined. At least we would have a complete adjudication had it not been summarily decided and findings made by the lower court relative to the rights of the City of Audubon Park as to the (a) height which aircraft may fly over this City, (b) the amount of smoke which may be emitted by such aircraft, (c) the amount of noise which may be created by such aircraft, (d) the effect upon the health of the inhabitants of the City, (e) the effect upon the safety on the inhabitants of the City, and (f) the effect upon the general welfare of the inhabitants of the City. These are all of vital consequence but yet the present record is devoid of any judgment or finding relative to the City's rights and duties in these matters.

The only authorities relied upon by the Court were the New York City cases* and an examination of these authorities show that there were many of the protective standards established and referred to in these decisions which are absent in this case and presently sought by the City of Audubon Park. For example, (1) noise standards were established and take-offs monitored to assure compliance, (2) preferential runway flights could not be made at low altitudes minimum of system established, (3) large aircraft prohibited from entering airport area at less than 1500 feet, (4) flights over the Village of Cedarhurst must be above 1000 feet—under unusual conditions might fly at height of 500 feet or 450 feet but never below 450 feet, (5) no flight over area between 10:00 P.M. and 7:00 A.M., except under emergency conditions. It was specifically pointed out in the City of Audubon Park Answer and Counter Declaration, paragraph 2, subparagraph 3, that a declaration was asked as to what, if any, standards must first be imposed by the Federal Aviation Administration for the protection of the health and safety for the inhabitants of the City of Audubon

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*American Airlines, Inc., et al. v. Town of Hempstead, et al., 272 F. Supp. 226 (June 15, 1966):

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 106 F. Supp. 521 (July 1, 1952);

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 201 F. 2d 273 (C.A. 2d, Jan. 7, 1953);

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 111 F. Supp. 677 (Apr. 10, 1953);

All American Airways, Inc., et al. v. Elderd, Mayor, et al., 209 F. 2d 247 (C.A. 2d, Jan. 4, 1954);

Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 132 F. Supp. 871 (June 27, 1955);

Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 238 F. 2d 812 (C.A. 2d, Dec. 13, 1956).

Park prior to a judicial determination of the invalidity of this or a similar ordinance for the health, safety and general welfare of the inhabitants of the City of Audubon Park. This requested declaration remains unanswered. Proof of the City of Audubon Park would be to the effect that none of the precautionary protections established in the New York City cases are present in this instance, and that the health, safety and welfare of the residents is in jeopardy.

Assuming that the Federal Aviation Administration has preempted the field and that they have complete dominion and control as to how high the planes must fly, the amount of noise they may make, the smoke they may emit, the effect that they may have upon the health of the inhabitants of the City of Audubon Park, complete jurisdiction as to the safety of the inhabitants of the City of Audubon Park and complete jurisdiction as to the general welfare of the citizens of Audubon Park, does such preemption if it is not exercised or arbitrarily exercised, deprive the City of Audubon Park from acting on failure of the preempting authority to act. Further does it bar inquiry into the complete lack of establishment of protective standards established in the New York City cases, or the arbitrary refusal to establish any standards.

The Board of Trustees of the City of Audubon Park has by ordinance attempted to protect the safety and health of its citizens. There has been no showing that such is not urgently needed. The District Court's failure to determine these issues is a violation and disregard of the constitutional safeguards vested in

the City of Audubon Park. These are basic issues which cannot be legally ignored.

There is no question but what a complete declaration of rights was not had in the lower Courts. This is normally a requisite to the giving of declaratory relief, for example, in a declaratory judgment action the Supreme Court in *Public Service Commission of Utah, et al.* v. *Wycoff Co., Inc.*, 344 U.S. 237, 73 S. Ct. 236, 96 L. Ed. 1368 states:

> "Of course, the remedy is not to be withheld because it necessitates weighing conflicting evidence or deciding issues of fact as well as law . . . But when the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted."

§12 of *Uniform Act:*

> "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and to be liberally construed and administered."

Anderson Actions for Declaratory Judgments, Vol. I, page 520, §232:

> "The equitable rule, that when the party comes into a Court of Chancery pleading facts that would entitle him to some equitable relief, the court will assume jurisdiction of the entire controversy and

grant all of the relief which the proof warrants, though it may not be the same prayed for. This is particularly applicable to declaratory actions."

A complete or effective judgment must be entered. *Alabama State Federation of Labor, et al.* v. *McAdory, et al.*, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384, 462 states:

"The declaratory judgment procedure may be resolved to only the sound discretion of the Court and where interests of justice will be advanced and an adequate and effective judgment may be rendered."

It is submitted that neither an adequate or effective judgment has been rendered in this action at the present time.

III.

The City of Audubon Park Has the Right to Raise the Issue of Illegality of Present Operations Over the City of Audubon Park From a Taking of Property Without Compensation Standpoint and to Raise Such Issue Both on the Behalf of Individual Residents and on Behalf of the City Itself as to Property Actually Owned (Park Property, Roads) By the City of Audubon Park.

The City of Audubon Park in its Amendment to Answer and Counter Declaration, filed February 27, 1968 (Appendix "R" 44a-45a), denied that the alleged preemption of navigable air space is a lawful enactment in that the navigable air space designated and sought to be used by Respondents has not been acquired under the mandatory requirements of the *Constitution*

of the United States, Amendment 5, providing, "nor shall private property be taken for public use without just compensation" and *Amendment 14,* §1, and likewise in contravention of the *Constitution of the Commonwealth of Kentucky,* §1, sub-section 5, §13 and §242.

In effect this argument boils down to the question of Respondents' contention that they are using a designated flight easement under authority of the Act of Congress, 49 *U.S.C.* §1301 *et seq.,* ceding jurisdiction to the F.A.A. and under the F.A.A. regulations. The City of Audubon Park is not disputing the statutory authority vested in the F.A.A. nor the right of the F.A.A. to issue regulations (under this Point III, arbitrary failure to establish proper safeguards is an issue under Point II), but the City of Audubon Park does contend that there is no provision in this legislation 49 *U.S.C.* §1301 *et seq.* which permits acquiring aviation easements without payment therefor. If such payment has not been made as is the fact in this case, then the F.A.A. promulgation of easement rights are contrary to the Constitution and hence invalid. In other words there is no real validity as to these regulations and as to the flight pattern easement, for such easement is actually non-existent until acquired in a lawful manner which is not the fact of this case.

The flight pattern easement has not been acquired in accordance with Constitutional requirements and is hence a nullity. This is certainly not firm ground from which to assail the ordinance. Further such protective measures as contained in the ordinance should be a must for any local governmental unit for they are

primarily invested with the protection of the health, safety and general welfare of their inhabitants. If a preemption of such basic protective rights is attempted, such preemption must be legally substantiated and in accordance with Constitutional provisions. If not in accordance with Constitutional provisions, the protection of these basic rights of the citizens remain vested in the local governing body where it originally lay. If this be true, there is no question but what Ordinance No. 4, Series 1967, is a valid enactment and is presently being violated.

In presenting this point before the Honorable Henry Brooks, District Judge, Judge Brooks stated that he was agreeing with the writer and that there was no doubt that individuals would have the right to raise this question and should be compensated for their loss of property rights taken but that he did not believe that this question could be raised on the individual's behalf by the City of Audubon Park. We believe this ruling to be error in two respects, first, that it could not be raised by the City of Audubon Park on behalf of its citizens. This issue should be a must for any local governmental unit for they are primarily vested with the protection of health, safety and welfare of their inhabitants. If a preemption has occurred which would divest them of this responsibility then this preemption must be solidly based and in accordance with Constitutional provisions. If not, such is a nullity and the basic protection of the inhabitants is vested in the local governmental unit where it originally lay. If this be true there is no question

but what Ordinance No. 4, Series 1967 is a valid enactment and is presently being violated.

It is believed that the immediately preceding argument is all inclusive and needs no further elaboration. However, there is an additional and indisputable reason for permitting the City of Audubon Park to raise this issue. The City of Audubon Park is the owner of park property directly in this alleged flight pattern easement as well as roadway property. There is no question that compensation must be paid a municipality for the taking of property as well as individual owners. *City of Louisville* v. *President and Trustees of the University of Louisville,* Ky., 15 B. Mon. 642, 675 (1855):

29 *C.J.S.* 868 §196 states:

> "Where the statute requires a corporation condemning land to make compensation to all persons, the state has the same right to compensation as an individual, although it is not specifically mentioned in the statute."

Nichols Eminent Domain, Vol. 2, page 345, §5.9:

> "Over the property which a municipal corporation acquires as an agency of the state for the performance of the strictly public duties devolved upon it by law, the legislature may exercise a control to the extent of requiring the municipal corporation, without receiving compensation therefor, to transfer such property to some other agency of the government to be devoted to similar public uses or to other strictly public purposes. The property acquired by a municipal corporation for

the private benefit of their inhabitants is protected by the constitution and can be taken only by eminent domain and upon payment of its value.

"Where municipal property is taken in eminent domain by the federal government or some agency, private or otherwise, to which the federal power has been delegated, compensation must be paid whether the property is held in a governmental or proprietary capacity. In this respect the rule is the same as in the case of a federal acquisition of state property."

We believe the question of compensation being a must in this factual situation has been unequivocally determined. *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1945); *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962). State Court decisions are to the same effect. *Thornbury* v. *The Port of Portland,* Ore., 376 P. 2d 100; *Bowling Green-Warren County Airport Board* v. *Long,* Ky., 364 S. W. 2d 167.

IV.

49 *U.S.C.*, §1301, *Et Seq.* Does Not Deprive City of Audubon Park of Its Health and Safety Police Powers.

This statute itself, 49 *U.S.C.* §1301, *et seq.,* does not specifically vest in the F.A.A. local police powers relative to health and safety of a local unit of government. Such cannot be implied and even had the statute so provided it would run afoul of Constitutional and basic separation of governmental powers.

One of the main problems of the City of Audubon Park in connection with this litigation has been that

while the lower courts, particularly the District Court, have been cognizant that the City may have a problem they are nonetheless reluctant to inquire into it because of a general overriding welfare feeling. It has been assumed that the F.A.A. is more cognizant of adequate health, safety and welfare standards for the City of Audubon Park than the City's Board of Trustees. This is of course disputed and while it may or may not be true, none of the facts of adequacy of safeguards or necessity of the ordinance has been established in this proceeding.

Early in the oral arguments in the Circuit Court of Appeals one of the Judges stated that what the City of Audubon Park was attempting to do was to regulate air commerce. This is completely contrary to the grounds for the City's counter declaratory action. The major issue is whether or not the Board of Trustees can enact health and safety ordinances for the protection of its inhabitants. To simply assume that this City is attempting to regulate interstate commerce is begging the question. We ask that the real issues in this action be determined.

CONCLUSION.

It is believed that judgments have been entered in the lower courts without inquiry into factual issues of health and safety and that they have been entered without a complete declaration of the issues presented. It is apparent from a mere reading of the opinions in such cases as Hempstead and Cedarhurst that precautions and regulations, to protect the inhabitants in

that area are not effected in the present case. Again to go into the assumed basis of the judgments, it was stated by the District Judge that he felt monetary damage would be available but that this was an action of the Board of Trustees, or legislative body, and was a health and safety enactment. This is true, health and safety were paramount in enacting the ordinance. However, as relief as a practical matter was of the prime importance to the City, an amendment was filed raising this issue as to the City's property, *i.e.* park and roadway property. This was another issue left undecided.

It is assumed that a populace can learn to live with what is considered by them to be unsafe and unhealthy conditions but the governmental body of any such City must fulfill its obligations to its inhabitants and if it has no rights or powers in the present situation relative to judicial relief such should be clearly and unequivocally determined. It is the contention of the Petitioners that such judicial relief is not foreclosed.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS

DECIDED: MARCH 14, 1969

For the Sixth Circuit

No. 18675

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - *Plaintiffs-Appellees,*

v.

CITY OF AUDUBON PARK, KENTUCKY, and
BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. AMSHOFF and DR. BURTON M. HEINE, - - - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky, Louisville Division.

JUDGMENT.

The Court Orders and Adjudges:

1. Plaintiffs' motion to strike Paragraph 2 of Defendants' Counter Declaration is sustained.

2. Plaintiffs' motion to dismiss Paragraph 3 of Defendants' Amended Counter Declaration is sustained.

3. Plaintiffs' motion for summary judgment is sustained.

4. As a declaration of the rights of the parties, it is adjudged that:

A. The airspace above the City of Audubon Park through which the regulations of the Federal Aviation Administration, Department of Transportation, authorize and require the aircraft of Plaintiffs to approach for landing on Runway 19 at Standiford Field, Louisville, Kentucky, is within the navigable airspace of the United States as defined in Title 49 USC § 1301(24), and this navigable airspace extends below an elevation of 750 feet.

B. Ordinance No. 4, Series 1967, of the City of Audubon Park, Kentucky, is unconstitutional, void and unenforceable.

5. The Defendants, City of Audubon Park, Kentucky, and the Defendant Trustees of said City, George W. Stebbins, H. Patterson Pope, Mrs. Clarence L. Henderson, Theodore H. Amshoff and Dr. Burton M. Heine, and each of them, individually, and in their respective capacities as officials of the City of Audubon Park, and other officials of said City, their representatives, agents, servants, employees, attorneys and successors, be and they are permanently enjoined from arresting or threatening to arrest, from bringing directly or indirectly, or from permitting to be brought directly or indirectly any criminal or civil proceeding for the purpose of enforcing Ordinance No. 4, Series 1967, against the Plaintiffs or any of them, or their officials, agents, employees, servants or representatives, and from threatening to enforce against the Plaintiffs or any of them or their officers, agents, employees, servants or representatives, the penalties provided for in said ordinance and from prosecuting criminally the Plaintiffs or their officers, agents, employees, servants or representatives or any of them for doing any act or thing purportedly forbidden by the said ordinance, and generally from doing any act or thing to carry out or enforce any of the provisions of the said ordinance.

6. The Plaintiffs are granted judgment against the Defendant, City of Audubon Park, Kentucky, for their costs herein expended.

(s) Henry L. Brooks,
United States District Judge.

Tendered by:

Wyatt, Grafton & Sloss,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202.
(s) Wilson W. Wyatt
(s) Stuart E. Lampe
(s) James N. Williams, Jr.

Entered April 1, 1968
Martin R. Glenn, Clerk,
By Deputy Clerk

A Copy: Attest
Martin R. Glenn, Clerk,
By (s) R. Gorman,
Deputy Clerk.

OPINION—Filed March 14, 1969.

Before: WEICK, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

PER CURIAM. This case is before the Court on an appeal from summary judgment entered in favor of the plaintiffs-appellees declaring an ordinance of the defendant-appellant City of Audubon Park to be invalid and enjoining the municipality from enforcing it. The City of Audubon Park adjoins Standiford Field, a major airport serving the city of Louisville, Kentucky. The ordinance of the City of Audubon Park which is at the heart of this action declared it to be unlawful to operate an aircraft over the municipality below an elevation of 750 feet.

Pursuant to 49 U.S.C. §§ 1303, 1304, 1348(a) and 1348(c) the Federal Aviation Administration (hereinafter "FAA") of the United States Department of Transportation has adopted various regulations which control the use of the air space above the City of Audubon Park and the operation of aircraft therein. Those regulations require that aircraft coming in to land at Standiford Field must approach the Field on a glide-slope path which would put the aircraft at an elevation below 750 feet when passing over the municipality. The operators of plaintiffs-appellees' aircraft must comply with the FAA regulations. They require and authorize aircraft to approach on a glide path which crosses the most distant limit of the City of Audubon Park at an elevation of 442 feet and crosses the city limit nearest the Field at an elevation of 282 feet.

The foregoing facts and others pertinent to the determination of the District Court were established by the pleadings and by uncontroverted affidavits supporting the motions for summary judgment and injunction and it is here determined that the case was in proper posture for summary judgment determination. Rule 56(c), Federal Rules of Civil Procedure. The findings of fact filed by the District Court are not controverted in this appeal. Such findings included the determination that "Pilots operating the aircraft of Plaintiffs cannot comply with the FAA regulations and also comply with the provisions of the ordinance of the City of Audubon Park." The conclusions of law filed by the District Court included the determination that "Enforcement of Ordinance No. 4, Series 1967, of the City of Audubon Park would constitute an intolerable and undue burden upon interstate and foreign commerce . . . [T]he City of Audubon Park has no power to regulate interstate and foreign air traffic in the manner set forth in said ordinance." The ordinance was further concluded to be "unconstitutional and void, and, therefore, . . . unenforceable."

It is here determined that the findings of fact filed by District Judge Henry L. Brooks are supported by the record, that the accompanying conclusions of law are correct and the judgment from which this appeal was perfected is affirmed.

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 227

CITY OF AUDUBON PARK, KENTUCKY and BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. ARENHOFF and DR. BURTON M. HEINE, Petitioners,

—Against—

AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., and TRANS WORLD AIRLINES, INC., Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for Respondents.

STUART R. LAPP,
JAMES H. WILLIAMS, JR.,
Of Counsel.

July 8, 1959

INDEX TO BRIEF.

	PAGE
INDEX TO APPENDIX	iii–iv
TABLE OF AUTHORITIES	v–vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS	2
COUNTER-STATEMENT OF QUESTIONS PRESENTED	2– 3
COUNTER-STATEMENT OF THE CASE	3– 4
COMMENT ON STATEMENT OF THE CASE IN THE PETITION	5– 6
ARGUMENT	6–25
I. There Is No Conflict Between the Lower Court Decision and the Decisions of This Court	6
II. There Is No Conflict of Decisions Among the Courts of Appeals	7– 8
III. There Is No Important Novel Question of Federal Law Which Should be Decided by This Court	9–25
A. The Ordinance Clearly Violates the Constitution	9–16
1. There is a Direct Conflict Between the Ordinance and the Federal Statutes and Regulations	9–11

PAGE

2. The Congress Has Preempted the Regulation of Navigable Airspace and of Air Traffic Therein. 11–14

3. The Ordinance is an Intolerable and Undue Burden on Interstate Commerce. . . . 15–16

B. This is Not a "Taking" Case. 16–20

1. The Only Issue is Whether the Ordinance is Valid; Rights of Landowners are Not Involved. 16–17

2. The Pleadings Do Not Allege a "Taking" of Property. 18

3. For a "Taking" Case We Have the Wrong Parties—Both Plaintiffs and Defendants. 18–19

4. If Audubon Park Has Any Complaint Relative to FAA Regulations, It Must First Exhaust Its Administrative Remedy. 19–20

C. It is Inappropriate For the Court to Render an Advisory Opinion to Audubon Park as to Powers of Its Board of Trustees Relative to Enactment of Future Ordinances. 20–21

D. The District Court Appropriately Entered Summary Judgment. 21–25

CONCLUSION 25–26

APPENDIX (Separate Volume) 1b–37b

INDEX TO APPENDIX.

	PAGE
Findings of Fact and Conclusions of Law	1b–9b
United States Constitution	
Commerce Clause, Art. I, § 8, Cl. 3	9b
Supremacy Clause, Art. VI, Par. 2	9b
Courts of Appeals; Certiorari 28 USC § 1254	9b
Judiciary and Judicial Procedure Act	10b–12b
28 USC § 1331	10b
28 USC § 1332	10b–11b
28 USC § 1337	11b
28 USC § 2201	11b–12b
28 USC § 2202	12b
Federal Aviation Act of 1958	12b–15b
49 USC § 1301(24)	12b
49 USC § 1303	12b–13b
49 USC § 1304	13b
49 USC § 1348	13b–14b
49 USC § 1486	14b–15b
49 USC § 1508	15b
Federal Aviation Regulations	16b–32b
14 CFR § 1.1	16b
14 CFR § 11.75	16b
14 CFR § 71.11	16b–17b
14 CFR § 71.171	17b
14 CFR § 77.13	17b–18b
Diagrams Illustrating 14 CFR § 77.13	19b–20b
14 CFR § 77.23	21b
Diagram Illustrating 14 CFR § 77.23	22b
14 CFR § 77.27	23b–24b
Diagram Illustrating 14 CFR § 77.27	25b
14 CFR § 91.75	26b

PAGE

14 CFR § 91.87 ..... 26b–27b
14 CFR § 91.115 ..... 28b
14 CFR § 91.117 ..... 28b
14 CFR § 97.17 ..... 29b
Eastern Air Lines Approach Chart for Runway 19 ..... 30b
14 CFR § 121.133 ..... 31b

Ordinance No. 4 Series 1967, City of Audubon Park, Kentucky 31b–32b

Certified Copy of Judgment Incorporating the City of Audubon Park 33b–36b

Julliard Exhibit "A" 37b–38b

TABLE OF AUTHORITIES.

Cases:

	PAGE
All American Airways, Inc. v. *Village of Cedarhurst,* 106 F. Supp. 521 (E.D.N.Y., 1952), *aff'd* 201 F. 2d 273 (2d Cir., 1953); 111 F. Supp. 677 (E.D.N.Y., 1953), *aff'd* as *All American Airways, Inc.* v. *Elderd, Mayor,* 209 F. 2d 247 (2d Cir., 1954); *Allegheny Airlines, Inc.* v. *Village of Cedarhurst,* 132 F. Supp. 871 (E.D.N.Y., 1955), *aff'd* 283 F. 2d 812 (2d Cir., 1956)	7
American Airlines, Inc. v. *Town of Hempstead,* 272 F. Supp. 226 (E.D.N.Y., 1967), *aff'd* 398 F. 2d 369 (2d Cir., 1968), *cert. denied,* ____ U. S. ____, 89 S. Ct. 620, 21 L. Ed. 2d 561 (1969)	8, 16–17
Chicago & S Airlines v. *Waterman S.S. Corporation,* 333 U. S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948)	20
F.A.R. Liquidating Corp. v. *Brownell,* 209 F. 2d 375 (3rd Cir., 1954)	23
Griggs v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962)	17, 18
Hurley v. *Kincaid,* 285 U. S. 95, 52 S. Ct. 267, 76 L. Ed. 637 (1932)	17
International L. & W. Union v. *Boyd,* 347 U. S. 222, 74 S. Ct. 447, 98 L. Ed. 650 (1954)	21
Mercer County, et al. v. *Ballinger,* 238 Ky. 120, 36 S. W. 2d 856 (1931)	17
Southern Pacific Company v. *Arizona,* 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)	15–16
United States v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946)	18

Statutes:

28 USC § 1331	2
28 USC § 1332	2
28 USC § 1337	2
28 USC § 2201	2

PAGE

49 USC § 1301(24). 2, 3, 9–10
49 USC § 1303. 3
49 USC § 1304. . . . . 3, 9
49 USC § 1348. . . . . 3, 10
49 USC § 1486. 20
49 USC § 1508. 12

Regulations:

14 CFR § 1.1. 13
14 CFR § 11.75. 19
14 CFR § 71.11. 13
14 CFR § 71.171. 13
14 CFR § 77.13. 13
14 CFR § 77.23. 13
14 CFR § 91.75(b). 10
14 CFR § 91.87(b). 10
14 CFR § 91.87(d). 10
14 CFR § 91.115 10
14 CFR § 91.117(b). 10

Miscellaneous:

Federal Rules of Civil Procedure, Rule 56. 23
H. Rep. No. 2360, 85th Cong., 2d Sess. (1958). 14
Moore's Federal Practice, Vol. 6, § 56.11 [3], p. 2164. 23
S. Rep. No. 1811, 85th Cong., 2d Sess. (1958). 14
U. S. Constitution, Commerce Clause. 15
U. S. Constitution, Supremacy Clause. 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 227

CITY OF AUDUBON PARK, ET AL., - *Petitioners,*

—AGAINST—

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - - *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Sixth Circuit, printed in Petitioners' Appendix at p. 23 is reported at 407 F. 2d 1306 (Mar. 1969). The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Kentucky (Brooks, J.) are reported at 297 F. Supp. 207 (Apr. 1968) and are reprinted at p. 1b of the Appendix hereto.

JURISDICTION.

The Petitioners have invoked the authority of this Court under 28 U.S.C. § 1254(1). The jurisdiction of the Federal District Court was based on 28 U.S.C. §§ 1337, 1331, 1332 and 2201 *et seq.*

Respondents received copies of the Petition by mail on June 6, 1969.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS.

In addition to the provisions of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301, *et seq.*), this case involves Federal Aviation regulations adopted pursuant to said Act, and also involves constitutional provisions and Ordinance No. 4 Series 1967 of the City of Audubon Park. The ordinance, constitutional provisions, pertinent sections of the statutes, and pertinent regulations are all reproduced in the Appendix hereto.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Although Petitioners list ten separate questions to be presented, these ten questions may be condensed into the following:

1. Is the Ordinance by which Audubon Park attempted to prohibit flight in the airspace above it at an altitude less than 750 feet constitutional?
2. Is this a "taking" case?
3. Should the Court refrain from giving advisory opinions to Audubon Park as to powers of its

Board of Trustees relative to enactment of future ordinances?

4. Was it appropriate for the Court to enter summary judgment?

COUNTER-STATEMENT OF THE CASE.

The Findings of Fact[1] of the District Judge constitute a fair, adequate, and well-stated recitation of the facts pertinent to this controversy. Counsel for Petitioners has not challenged the Findings of Fact.

The City of Audubon Park (hereinafter "Audubon Park") is located to the north of Standiford Field and lies astride the extended center line of Runway 19, its nearest city limit being 4800 feet from the end of the runway and its most distant limit being 8000 feet from the end of the runway. (See diagram presented to the District Court as Julliard Exhibit "A" (R. App. 37b). An aircraft approaching to land on Runway 19 necessarily uses the airspace over Audubon Park (Finding of Fact 3, R. App. 2b).

The Respondents (hereinafter sometimes "the Airlines") are all engaged as common carriers in the interstate transportation of passengers, property, and United States mail to and from Standiford Field (Finding of Fact 2, R. App. 2b).

Pursuant to 49 U.S.C. §§ 1301, 1303, 1304, 1348(a) and 1348(c) (to be cited in the Argument herein) the Federal Aviation Administration (hereinafter

[1] *American Airlines, Inc.* v. *City of Audubon Park*, 297 F. Supp. 207 found in Appendix to this brief beginning at p. 1b. This Appendix will be referred to as R. App. Petitioners' Appendix will be referred to as P. App.

"FAA") of the United States Department of Transportation has adopted various regulations[2] which control the use of the airspace above Audubon Park and the operation of aircraft therein.

On the 20th of November, 1967, the Board of Trustees of Audubon Park enacted its Ordinance No. 4, Series 1967 (hereinafter "The Ordinance," R. App. 31b), by which it declared that it was unlawful for any person, corporation, or other entity to operate an aircraft at a height of less than 750 feet in the airspace over Audubon Park. The ordinance provided for a fine of $100 for each offense. The officials of Audubon Park announced their intention vigorously to enforce the Ordinance and to institute criminal proceedings against the Airlines in the event of any flights lower than said elevation of 750 feet (Finding of Fact 4, R. App. 3b).

Because of the threat by Audubon Park, the Airlines were forced to bring this action to obtain injunctive relief from the effects of its unconstitutional provisions. The FAA regulations authorize and require Respondents' aircraft to fly over Audubon Park at an elevation between 442 feet and 282 feet above ground level; the Ordinance prohibits flight below 750 feet. The Airlines simply cannot comply with both (Finding of Fact 17, R. App. 6b).

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[2]Beginning at R. App. 16b are the various regulations referred to, and supporting charts and maps.

COMMENT ON STATEMENT OF THE CASE IN THE PETITION.

It is appropriate to comment briefly on certain statements of fact in the Petition which are wholly unsupported in the record. Counsel for Petitioners refers to "health and safety hazards," "wining and dining, inspections and some promised relief," "one year of intensive study and meeting with Air Board Authorities" (pp. 4-5 of Petition). There is nothing in the record to support these statements.

Counsel for Petitioners inaccurately assert that the Airlines claim the right to fly aircraft as low as 84 feet at the city's boundary closest to the airport. The 84-foot elevation at that point is one above which FAA seeks to control construction of improvements on land, so that no obstruction may protrude above such elevation. It is not an elevation at which Airlines claim the right to fly.

There is also nothing in the record to support the statement on p. 4 of the Petition that the City of Audubon Park was established in 1908, thus making it appear that the City was incorporated long before the development of Standiford Field. Since Petitioners' counsel make this assertion Respondents have examined the public records only to learn that Audubon Park was first incorporated as a Sixth Class City in Kentucky on April 18, 1941. (See certified copy of Judgment incorporating Audubon Park at R. App. 33b).

Counsel goes on to assert that Petitioners "will offer proof that flights are regularly made at" lower altitudes than 145 and 84 feet above Audubon Park. Not a word in the record supports these assertions. These assertions can only be made to confuse the one clear-cut issue in this case:

Is the Ordinance valid?

ARGUMENT.

Audubon Park has failed to state specifically any of the grounds set forth in Rule 19 of this Court upon which a writ of certiorari may be granted. The only grounds that could have any relevancy to the issues involved may be paraphrased as follows:

I. A conflict between the lower court decision and the decisions of this Court.

II. A conflict of decisions among the Courts of Appeals.

III. The Court of Appeals below decided an important novel question of federal law which should be decided by this Court.

I.

THERE IS NO CONFLICT BETWEEN THE LOWER COURT DECISION AND THE DECISIONS OF THIS COURT.

Audubon Park does not contend that there is any conflict between the decision of the Sixth Circuit Court of Appeals and any of the decisions of this Court. The reason is clear: no such conflict exists.

II.

THERE IS NO CONFLICT OF DECISIONS AMONG THE COURTS OF APPEALS.

The only other Court of Appeals to consider the questions presented in this controversy has been the Court of Appeals for the Second Circuit which, in two different opinions, reached the same result as did the Court of Appeals for the Sixth Circuit in this case.

In 1956, the Court of Appeals for the Second Circuit in *Allegheny Airlines, Inc., et al.* v. *Village of Cedarhurst, et al.*, 238 F. 2d 812 (2d Cir., 1956)[3] considered an ordinance of the Village of Cedarhurst, which prohibited flight by aircraft over that village at elevations of less than 1000 feet.

The then Civil Aeronautics Board had established landing procedures which required aircraft to fly over Cedarhurst at altitudes below 1000 feet.

The Court held without equivocation that the Congress had preempted the field and that the Ordinance was invalid. No writ of certiorari was sought in the *Cedarhurst* case.

In 1964, the Town of Hempstead, New York, enacted an ordinance which prohibited the creation of noise exceeding certain specified levels of intensity.

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[3]This controversy was the subject matter of six reported opinions; the five earlier ones were *All American Airways, Inc.* v. *Village of Cedarhurst*, 106 F. Supp. 521 (EDNY, 1952); *All American Airways, Inc.* v. *Village of Cedarhurst*, 201 F. 2d 273 (2d Cir., 1953); *All American Airways, Inc.* v. *Village of Cedarhust*, 111 F. Supp. 677 (EDNY, 1953); *All American Airways, Inc.* v. *Elderd, Mayor*, 209 F. 2d 247 (2d Cir., 1954); and *Allegheny Airlines, Inc.* v. *Village of Cedarhust*, 132 F. Supp. 871 (EDNY, 1955). References hereinafter to the *Cedarhurst* opinion shall relate to the sixth and last opinion reported at 238 F. 2d 812.

Jet aircraft could not use the airspace necessary to land on certain runways at nearby Kennedy Airport without creating the noise prohibited by that ordinance. Various airlines challenged the validity of the ordinance in the District Court for the Eastern District of New York. The District Judge, in an opinion reported as *American Airlines, Inc.* v. *Town of Hempstead,* 272 F. Supp. 226 (EDNY, 1967), held:

(1) That the ordinance was an unconstitutional burden on interstate commerce;

(2) That the area in which the ordinance operated had been preempted by federal legislation and regulation; and

(3) That the ordinance was in direct conflict with valid applicable federal regulations.

In an opinion styled *American Airlines Inc.* v. *Town of Hempstead,* 398 F. 2d 369 (1968), the United States Court of Appeals for the Second Circuit affirmed. Relying on its earlier opinion in *Cedarhurst,* the Court held the *Hempstead* ordinance to be invalid "for in effect there is square conflict between the local ordinance and federal regulation in each case." 398 F. 2d 375, 376.

A writ of certiorari was sought in the *Hempstead* case, but denied —— U. S. ——, 89 S. Ct. 620, 21 L. Ed. 2d 561.

Cedarhurst and *Hempstead* are so squarely in point, that, based upon those precedents alone, the writ of certiorari should be denied. We will, however, proceed further to demonstrate the soundness of the results in those cases.

III.

THERE IS NO IMPORTANT NOVEL QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

A.

The Ordinance Clearly Violates the Constitution.

For the following reasons the ordinance is in direct conflict with provisions of the U. S. Constitution:

1. There is a direct conflict between it and applicable valid federal regulations.
2. The area in which the ordinance attempts to operate has been preempted by federal legislation and federal regulation.
3. The ordinance is an intolerable and undue burden on interstate commerce.

1. THERE IS A DIRECT CONFLICT BETWEEN THE ORDINANCE AND THE FEDERAL STATUTES AND REGULATIONS.

Article VI of the Constitution provides that the laws of the United States "shall be the supreme law of the land." Local statutes or ordinances which are in conflict are invalid.

Congress has provided in 49 U.S.C. § 1304:

> "There is recognized and declared to exist in behalf of any citizen of the United States *a public right of freedom of transit through the navigable airspace of the United States.*" (Emphasis added.)

"Navigable airspace" is defined in 49 U.S.C. § 1301 (24):

> "'Navigable airspace' means *airspace above the minimum altitudes of flight prescribed by regulations* issued under this chapter, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" (Emphasis added.)

49 U.S.C. § 1348(a) grants to the Administrator of the FAA the authority "to develop plans for and formulate policies with respect to the use of the navigable airspace; and assign by rule, regulations, or order the use of the navigable airspace . . ."

The administrator is given authority under § 1348 (c) "to prescribe air traffic rules and regulations governing the flight of aircraft. . . ."

Pursuant to these powers the Administrator has adopted comprehensive and thorough regulations.[4]

A pilot approaching Runway 19 as he flies in the air above Audubon Park has no choice. He must be in contact with the FAA's Air Traffic Control personnel in the control tower at Standiford Field, 14 CFR § 91.87(b) (R. App. 27b). He must follow the instructions of that control tower, 14 CFR §§ 91.75(b) and 91.115, (R. App. 26b-28b). As he descends to an altitude of 400 feet, which point is directly over Audubon Park, if he cannot see Runway 19 or its approach lights, he must abort his approach and execute a "missed approach procedure," (14 CFR § 91.87(d)(3) 14 CFR § 91.117, R. App. 28b; see Julliard Exhibit "A," R. App. 37b). He is directed by FAA regulations to use an approach slope which, subject to bracketing

[4] All cited regulations are reproduced in full in Respondents' Appendix.

maneuvers, brings him in at an elevation of 442 feet at the distant city limits of Audubon Park and at an elevation of 282 feet at the near boundary of the City (Finding of Fact 11, R. App. 5b). His bracketing maneuvers conceivably could bring him in at a lower elevation, but in no event lower than the approach clearance surface shown as line E on Julliard Exhibit "A," (R. App. 37b). This approach clearance surface is at a 259-foot elevation at the far limit of Audubon Park, and a 160-foot elevation at the near limit.

It is patently obvious that a pilot *cannot follow the federal regulations* adopted pursuant to Congressional action *and also comply with the provisions of the Ordinance* of Audubon Park.

The District Court expressly so held in its Findings of Fact 17 (R. App. 6b), in the following clear language:

> "Pilots operating the aircraft of plaintiffs cannot comply with the FAA regulations and also comply with the provisions of the ordinance of the City of Audubon Park."

The federal law and regulation must prevail.

2. THE CONGRESS HAS PREEMPTED THE REGULATION OF NAVIGABLE AIRSPACE AND OF AIR TRAFFIC THEREIN.

Although, as was decided in *Hempstead,* the fact that the ordinance conflicts with federal law and regulations is alone sufficient to invalidate it, the scope of the federal statutes and regulations so encompasses the field that the principle of federal preemption also

applies. Preemption, of course, is not a new doctrine in the law and considered alone cannot constitute an important novel issue which should be decided by the Court.

There may be some remnant in the broad area of aviation law which the states and local governments may still regulate. When, however, it comes to the manner in which aircraft may use the navigable airspace necessary for a safe landing at an airport with a control tower manned by FAA personnel, that field of regulation has been fully occupied by federal law.

Can there be any stronger language than that contained in 49 U.S.C. § 1508:

> "The United States of America is declared to possess and exercise *complete and exclusive national sovereignty in the airspace of the United States.* . . ." (Emphasis added.)

We have already shown that pilots are specifically authorized and directed by FAA regulation to descend to 400 feet over Audubon Park and at that elevation, when indicated, execute missed approach procedures. We have pointed out that aircraft are authorized and directed to approach Runway 19 on a pre-determined glide slope at elevations in conflict with the ordinance.

FAA has entered the field of protecting the navigable airspace to an even greater extent. Part 77 of the regulations deals with "objects affecting navigable airspace," (R. App. 17b-25b). Part 77 requires prior notice to the Administrator of the FAA of any con-

struction or alteration which penetrates above certain altitudes, depicted on Julliard Exhibit "A" (R. App. 37b).[5] Thus for the purpose of preventing obstructions from protruding upward into the navigable airspace, FAA has adopted regulations relative to elevations as low as 100 feet above ground level and even to lower elevations at the immediate approach to a runway. See also 14 CFR §§ 1.1, 71.11, 71.171 (R. App. 16b, 17b).

The District Court (in Conclusion of Law 11, R. App. 8b) held:

> "The statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic. The City of Audubon Park, therefore, has no power to enact Ordinance No. 4, Series 1967."

The comprehensiveness of the federal regulatory scheme putting into effect the Congressional intent is so extensive in and of itself as to preempt the field completely from local regulation. The comprehensive nature of the scheme, however, is not the sole basis for inferring an intent to preempt the field. Legislative history clearly supports the conclusion that Congress has expressly preempted the regulation of airspace use and air travel above Audubon Park. The Senate committee report reads:

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[5]Different sections of Part 77 define different altitudes above which notice must be given. Three of these sections establish altitudes less than 750 feet over Audubon Park. The provisions of 14 CFR § 77.13 are depicted as line A on Julliard Exhibit "A." The provisions of 14 CFR § 77.23(a)(3) are depicted as line B on Julliard Exhibit "A." The provisions of 14 CFR § 77.23(a)(8) are depicted as line C on Julliard Exhibit "A."

> "The present legislation proposes to clear away this ambiguity [caused by scattered responsibility] once and for all by *vesting unquestionable authority for all aspects of airspace management in the Administrator* of the new Agency" [S. Rep. No. 1811, 85th Cong., 2d Sess., p. 14 (1958)]. (Emphasis added.)

In the House Report it is stated:

> "Clearly an *agency* is needed now to develop a sound *national policy* regarding use of navigable airspace *by all users*—civil and military" [H. Rep. No. 2360, 85th Cong., 2d Sess., p. 4; 1958, U. S. Cong. & Adm. News 3744]. (Emphasis added.)

The principle of federal preemption and supremacy of federal law over state law is not a new doctrine. If there ever was a field in which federal preemption is needed, it is that dealing with navigable airspace. How many hundreds, even thousands, of small and large municipalities border upon, or are close to, the nation's airports? During landing and take-off, aircraft pass over these many different municipalities in such a short time it would be impossible for pilots to know, or even knowing, to comply with, differing regulations of the various municipalities. It is imperative that pilots not be distracted by a multiplicity of authority. Uniform procedures are absolutely essential for the safety of aircraft and their passengers.

To permit each municipality to make its own regulation would result in a chaotic plethora of differing regulations that could not possibly be followed.

3. THE ORDINANCE IS AN INTOLERABLE AND UNDUE BURDEN ON INTERSTATE COMMERCE.

Although either the principle of federal preemption or the direct conflict with federal regulation is adequate to establish the invalidity of the Ordinance, the District Court and the Sixth Circuit Court of Appeals found that it is also unconstitutional because it conflicts with the Commerce Clause, which assures freedom of commerce among the states. It can hardly be contended that this a novel question of federal law. See *Southern Pacific Company* v. *Arizona,* 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945).

The District Court found the Ordinance to be "an intolerable and undue burden upon interstate and foreign commerce" (Conclusion of Law 9; R. App. 8b), and further concluded:

> "Under the Commerce Clause (Art. I, § 8, Cl. 3) of the United States Constitution, the City of Audubon Park has no power to regulate interstate and foreign air traffic in the manner set forth in said ordinance" (Conclusion of Law 9, R. App. 4b).

The Sixth Circuit Court of Appeals affirmed the District Court's Findings of Fact and Conclusions of Law *in toto* (P. App. 25).

The Ordinance is not saved by asserting that it is merely an exercise of the inherent police power held by state and local governments. This Court made this clear in the *Southern Pacific* case, saying at 325 U. S. 779, 780:

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to effect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.' *Kansas Southern R. Co.* v. *Kaw Valley Drainage Dist., supra* (233 U. S. 79, 58 L. Ed. 859, 34 S. Ct. 564.)"

Audubon Park's Ordinance not only substantially restricts the flow of interstate and foreign commerce, but also undertakes to regulate an area which, by its nature, requires uniform, centralized regulation. It, therefore, clearly violates the Commerce Clause of the Constitution.

B.

This Is Not a "Taking" Case.

1. THE ONLY ISSUE IS WHETHER THE ORDINANCE IS VALID; RIGHTS OF LANDOWNERS ARE NOT INVOLVED.

By tedious reasoning counsel for Petitioners asserts that there has somehow been a "taking" of property from unnamed property owners by an unnamed taker, although no facts concerning such an issue were pleaded or proved.

In his Conclusion of Law 4 (R. App. 7b), the District Judge held clearly:

"This is not a 'taking' case."

In the *Hempstead* case, the Court at 398 F. 2d 372, had this to say:

> "Before considering the grounds advanced by the District Court for the conclusion that the ordinance is invalid, we may point out that *this case has nothing to do with questions of landowners' rights to compensation for overflights of their land which amount to a 'taking' of their property.* [See *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), and *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 585 (1962)]. *All that is involved is the validity of the ordinance.*" (Emphasis added.)

In this action by the Airlines against the City of Audubon Park and its officials, one question, and one question only, has been properly raised: Is the Audubon Park Ordinance valid or invalid?

Even if we indulge in the unfounded assumption that there has been a "taking," the United States Constitution would require compensation therefor, but not in advance of the "taking." In the case of *Hurley* v. *Kincaid,* 285 U. S. 95, 104, 52 S. Ct. 267, 76 L. Ed. 637 (1932), this Court stated, "The 5th Amendment does not entitle him [the complainant] to be paid in advance of the taking."

The Kentucky Court of Appeals has uniformly held that where there is a "taking" in advance of compensation the aggrieved landowner has a cause of action in the nature of a "reverse condemnation" to recover the same measure of damages he would have obtained in a condemnation proceeding. *Mercer County, et al.* v. *Ballinger,* 238 Ky. 120, 36 S. W. 2d 856 (1931), cases therein cited, and numerous other cases.

2. THE PLEADINGS DO NOT ALLEGE A "TAKING" OF PROPERTY.

There is no allegation in the record that either the property of any named landowner, or any specific property of Audubon Park itself, has been taken.

In *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. ed. 1206 (1946), the Supreme Court held as follows:

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U. S. 266

No cause of action has been alleged setting forth such low and frequent overflights as to constitute a direct and immediate interference with the use and enjoyment of any specific piece of land, of any particular person or any particular entity.

3. FOR A "TAKING" CASE WE HAVE THE WRONG PARTIES—BOTH PLAINTIFFS AND DEFENDANTS.

When the question of "taking" was raised in *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962), the airport was owned by a municipality and the aircraft were owned by certain privately owned airlines. The Court was required to decide *who* had "taken" air easements: the airport, the airlines, or the C.A.A., acting as an authorized representative of the United States. The Supreme Court specifically held:

> "It is argued that though there was a 'taking,' someone other than respondent was the taker—the

> airlines or the C.A.A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitiutional sense." 369 U. S. 89

Standiford Field is operated by the Louisville and Jefferson County Air Board. That Board is not a party to this action.

Respondents' aircraft use Standiford Field entirely in accordance with FAA regulations. Audubon Park seems to be seeking judicial review of these regulations. Yet the FAA is not a party to this action.

4. IF AUDUBON PARK HAS ANY COMPLAINT RELATIVE TO FAA REGULATIONS, IT MUST FIRST EXHAUST ITS ADMINISTRATIVE REMEDY.

Counsel for Petitioners has intimated that Audubon Park and its residents and landowners will be totally without remedy if the District Court's judgment is affirmed. This is patently false. While we do not believe any recovery can be had, nevertheless it is true that the City and its landowners may litigate fully the "taking" issue by bringing appropriate action for damages against proper parties in a proper court. It is also true that under the FAA regulations they have an administrative remedy.

Pursuant to 14 CFR § 11.75 (R. App. 16b), "any interested person may petition to revoke or modify any rule or order . . ." of the FAA pertaining to use of the navigable airspace. This remedy Audubon Park must exhaust before complaining to the Courts.

After invoking its right to petition the FAA, if Audubon Park were to feel itself aggrieved by the action taken by the FAA, a review of that action by the courts is authorized by 49 USC § 1486.

Thus, both Audubon Park and its landowners have full and complete remedies they may pursue. These remedies have not been exhausted.

C.

It Is Inappropriate for the Court to Render an Advisory Opinion to Audubon Park as to Powers of Its Board of Trustees Relative to Enactment of Future Ordinances.

By Paragraph (2) of the Counter Declaration Petitioners say to this Court: If the Ordinance we enacted is not valid, what kind of ordinance can we enact in the future? A declaration of rights is sought in advance as to whether future legislation, if adopted, would be valid.

This certainly is not a justiciable issue.

Courts will not render advisory opinions. In *Chicago & S Air Lines* vs *Waterman S. S. Corp.*, 333 U. S. 103 at 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948), this Court stated:

> "This court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."

Even where statutes have already been enacted, this Court has refused declaratory relief where no attempt had been made to apply the statute to those seeking

relief. In *International L. & W. Union* v. *Boyd,* 347 U. S. 222 at 223, 74 S. Ct. 447, 98 L. Ed. 650 (1954), the Court ruled:

> "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."

The District Judge rendered a complete declaration as to the Ordinance Audubon Park had adopted. It correctly refused to render an advisory opinion as to possible future ordinances.

D.

The District Court Appropriately Entered Summary Judgment.

The issue in this case is one of law; no facts are in dispute. The simple question is: May Audubon Park legislate in the field of navigable airspace when its legislation conflicts with FAA regulations?

Counsel for Petitioners contends "that the factual issues have not been even dimly developed" and therefore asserts that the issues in controversy were not "ripe" for determination (p. 7, Petition). On the contrary, the Respondents fully developed all of the material facts and counsel for Petitioners was afforded every opportunity to develop any facts that conceivably could have raised a genuine factual issue.

On February 16, 1968, notice was served on counsel for Petitioners that on February 27 the Airlines would

move for summary judgment in this action. All the allegations in the Complaint filed by Respondents had been verified by sworn affidavit. Additional affidavits were also delivered to Counsel for Petitioners on February 16.

An extensive hearing was held by the District Judge on February 27. The Court determined that a permanent injunction should be adjudged and directed counsel for the Airlines to prepare Findings of Fact and Conclusions of Law and to tender Judgment.

When such Findings of Fact and Conclusions of Law were tendered, Counsel for Petitioners filed objections thereto and the action was again set down for a hearing on May 29, 1968. After an extensive hearing on that date, the Court changed slightly the tendered Findings of Fact and Conclusions of Law and, based thereon, on April 1, 1968, entered Judgment.

During all of this period, Petitioners filed only an unsworn Answer and Counter Declaration and an unsworn Amendment to Answer and Counter Declaration. No counter-affidavits, exhibits, or other material were ever tendered to the Court by Petitioners. Thus, Audubon Park passed up every opportunity to join an issue of fact.

It must, therefore, be concluded—as indeed, it is obvious—that Audubon Park could not have raised a genuine issue of material fact.

Since no facts were in dispute, the District Court entered a summary judgment based on the record before it.

Rule 56(e) was amended in 1963, because the Third Circuit, contrary to all of the other Circuits, had adhered to the position that affidavits did not overcome well-pleaded allegations. That rule now reads:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *If he does not so respond, summary judgment,* if appropriate, *shall be entered against him.*" (Emphasis added.)

In *Moore's Federal Practice,* the textwriter has the following to say:

> ". . . affidavits may be used to overcome pleading allegations. This had been the sound rule, even prior to the 1963 amendment to subdivision (e), *supra;* and that amendment settled the matter." 6 *Moore's Federal Practice* ¶ 56.11 [3] p. 2164.

Reliance is placed on *F.A.R. Liquidating Corporation* v. *Brownell,* 209 F. 2d 375 (1954). There the Court of Appeals for the Third Circuit stated that under the particular facts of that case, affidavits could not be used on summary judgment as the basis for deciding a fact issue. That case, however, was decided in 1954 before Rule 56(e) was amended, specifically authorizing reliance on affidavits.

None of the Petitioners' authorities can be relied upon when, as in our case, fully adequate facts are es-

tablished by uncontroverted affidavits which abundantly support the granting of a summary judgment. Especially is this true where no counter-affidavits of any nature were filed.

In the trial court Petitioners raised none of what are now termed "basic facts" on p. 9 of the Petition. It is certainly now inappropriate for them to attempt to rely on such "facts" not in the record. Nevertheless, let us examine the asserted "basic facts":

(a) "Actual height of flights" over Auduhon Park.

Is this a material fact? If the Ordinance is valid, then flights under 750 feet are violative of its provisions no matter what the actual height may be.

(b) "Noise involved."

But the issue of noise was not raised in the pleadings nor was there any attempt to establish the existence of noise by affidavit. Although it is common knowledge that noise emanates from jet aircraft, that fact does not affect the issue of whether a local ordinance is in conflict with federal law.

(c) (d) (e) (f) (g) (h) (j) Facts allegedly relative to smoke and gaseous fumes, the safety, health and general welfare of the inhabitants of Audubon Park and a suggestion of "protective measures" relative thereto.

In adopting regulations the FAA does not, indeed cannot, disregard the general welfare of persons or property on the ground. Once, however, the FAA has regulated the use of airspace over a particular city, can

that municipality, on a claimed adverse effect on the general welfare of its residents, enact legislation that conflicts with the federal law?

All of these questions are questions of law. Even if they could have been considered mixed questions of law and fact, Petitioners have foreclosed their right to rely on facts not established by some offer of a sworn statement on the record.

Viewed from every angle, the District Judge appropriately entered, and the Circuit Court appropriately approved, summary judgment.

CONCLUSION.

There is no genuine issue of material fact in this case. Summary judgment was patently a proper result.

It is elementary that Courts will not give advisory opinions relative to legislation not yet enacted.

There is no basis for Petitioners' efforts to introduce a "taking" issue in this case. The pleadings do not properly raise the issue. Neither the alleged "taker" nor the alleged "takees" are parties to this case.

Only one genuine issue exists in this controversy: Is the Ordinance of Audubon Park a valid one? It cannot be valid because:

(1) It conflicts with valid federal statutes and regulations.

(2) The Congress has preempted the regulation of navigable airspace and of air traffic therein.

(3) The Ordinance constitutes an unconstiutional burden on interstate commerce.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 2, 1969.

JUL 5 1960
JOHN T. DEVINE, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 227

CITY OF AUDUBON PARK, KENTUCKY and BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. AMSHOFF and DR. BURTON M. HEINE, - - - Petitioners,

—Against—

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., Respondents.

APPENDIX TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 2, 1960

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INDEX TO APPENDIX.

	PAGE
Findings of Fact and Conclusions of Law	1b– 9b
United States Constitution	
Commerce Clause, Art. I, § 8, Cl. 3	9b
Supremacy Clause, Art. VI, Par. 2	9b
Courts of Appeals; Certiorari 28 USC § 1254	9b
Judiciary and Judicial Procedure Act	10b–12b
28 USC § 1331	10b
28 USC § 1332	10b–11b
28 USC § 1337	11b
28 USC § 2201	11b–12b
28 USC § 2202	12b
Federal Aviation Act of 1958	12b–15b
49 USC § 1301(24)	12b
49 USC § 1303	12b–13b
49 USC § 1304	13b
49 USC § 1348	13b–14b
49 USC § 1486	14b–15b
49 USC § 1508	15b
Federal Aviation Regulations	16b–32b
14 CFR § 1.1	16b
14 CFR § 11.75	16b
14 CFR § 71.11	16b–17b
14 CFR § 71.171	17b
14 CFR § 77.13	17b–18b
Diagrams Illustrating 14 CFR § 77.13	19b–20b
14 CFR § 77.23	21b
Diagram Illustrating 14 CFR § 77.23	22b
14 CFR § 77.27	23b–24b
Diagram Illustrating 14 CFR § 77.27	25b
14 CFR § 91.75	26b

PAGE

14 CFR § 91.87 ..... 26b–27b
14 CFR § 91.115 ..... 28b
14 CFR § 91.117 ..... 28b
14 CFR § 97.17 ..... 29b
Eastern Air Lines Approach Chart for Runway 19 ..... 30b
14 CFR § 121.133 ..... 31b

Ordinance No. 4 Series 1967, City of Audubon Park, Kentucky 31b–32b

Certified Copy of Judgment Incorporating the City of Audubon Park 33b–36b

Julliard Exhibit "A" 37b–38b

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 5828

American Airlines, Inc., Et Al., - - - Plaintiffs,

v.

City of Audubon Park, Kentucky, Et Al., - Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

BROOKS, Chief Judge.

This action was submitted to the Court on the motion of the Plaintiff Air Lines for summary judgment dismissing the Counter Declaration of the Defendants and granting relief to the Plaintiffs in accordance with the demands contained in the prayer of their Complaint. The Court considered the verified Complaint of Plaintiff, the two Affidavits of Henry P. Julliard, the Affidavit of Clay W. Hedges, the Answer and Amended Answer of the Defendants including the Counter Declaration contained therein, the objections of the Plaintiffs to the filing of the Amended Answer, the Replies of the Plaintiffs to the Counter Declaration contained in the Original and the Amended Answer and the written Statement of Counsel for the Plaintiffs. The Court also considered the oral arguments for both Plaintiffs and Defendants at the hearing set for that purpose February 27, 1968.

FINDINGS OF FACT

The Court finds:

1. The Plaintiffs, American Airlines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc. and Trans World Air-

lines, Inc., are all corporations incorporated under the laws of the State of Delaware, and none of said Plaintiffs has its principal place of business in the Commonwealth of Kentucky. The Defendant, City of Audubon Park, Kentucky, is a municipal corporation of the Commonwealth of Kentucky, and each of the Defendant Trustees, George W. Stebbins, H. Patterson Pope, Mrs. Clarence L. Henderson, Theodore H. Amshoff and Dr. Burton M. Heine is a citizen and resident of Kentucky. As to each Plaintiff, the amount in controversy in this action exceeds, exclusive of interest and costs, the sum and value of $10,000. An actual controversy exists between the parties with reference to the constitutionality of an ordinance enacted by the City of Audubon Park and the conflict of its terms with Acts of Congress and regulations of the Federal Aviation Administration (hereinafter "FAA") Department of Transportation, adopted pursuant to Acts of Congress.

2. Each of the Plaintiffs is engaged as a common carrier in the transportation of passengers, property and mail of the United States Post Office Department, in interstate commerce to and from Standiford Field in Louisville, Kentucky, and the controversy in this litigation and the statutes, regulations and ordinance giving rise to this controversy affect such interstate commerce.

3. Standiford Field is controlled and operated by the Louisville and Jefferson County Air Board, a public entity, created by the laws of Kentucky. Each of the Plaintiffs, in the conduct of its business as a common carrier, has substantial contracts for the use of the facilities of Standiford Field. Runway 19 of Standiford Field (and its counterpart, Runway 1 which uses the same strip of concrete from the opposite direction) is 7,800 feet in length and is the longest runway at Standiford Field. As shown by the diagram filed as "Julliard Exhibit A" with his Affi-

davit of February 16, 1968, the City of Audubon Park lies astride the extended center line of Runway 19, the nearest limit of said City being 4,800 feet from the end of the runway and the most distant limit being 8,000 feet from the end of the runway. It is necessary for aircraft approaching for a landing on Runway 19 to fly in the navigable airspace over the City of Audubon Park.

4. The City of Audubon Park, on the 20th day of November 1967, enacted its Ordinance No. 4, Series 1967, by the terms of which it declared that it was unlawful for any person, agency, corporation or business entity to fly, operate, or in any manner participate in the flight or operation of any aircraft over the corporate limits of Audubon Park at a height of less than 750 feet and further provided for a fine in the amount of $100 for each offense against the provisions of the ordinance. The Defendant officials of Audubon have publicly and repeatedly announced their intention vigorously to enforce the ordinance; to institute criminal proceedings against the Plaintiffs in the event of any flights lower than said elevation of 750 feet.

5. Pursuant to 49 U.S.C. §§1303, 1304; 1348(a), 1348 (c), FAA has adopted various regulations affecting the navigable airspace in general all over the United States and in particular over Standiford Field and the City of Audubon Park, which regulations control the use of said airspace by all aircraft, including the aircraft of Plaintiffs.

6. By Regulation 14 C.F.R. 1.1, an airport traffic area is defined as the airspace within a horizontal radius of five statute miles from the geographical center of an airport such as Standiford Field, at which a control tower is operating, extending from the surface up to, but not including, 2,000 feet above the surface. The City of Audubon Park is within the airport traffic area of Standiford Field.

Findings of Fact and Conclusions of Law

7. 14 C.F.R. 71.11 provides that control zones listed in Sub Part F, consist of controlled airspace extending upward from the surface of the earth. 14 C.F.R. 71.171 (Sub Part F), specifically designates as a control zone the airspace within a five mile radius of Standiford Field.

8. 14 C.F.R. 91.87(a) and (b) require all persons operating aircraft to and from Standiford Field, when in the airport traffic area, to maintain two-way radio contact with the air traffic control tower maintained by FAA personnel. 14 C.F.R. 91.75 prohibits an operator of an aircraft, except in an emergency, from operating the aircraft in any manner contrary to an air traffic control instruction.

9. 14 C.F.R. 91.87(d)(3) requires an aircraft approaching to land on a runway served by a visual approach slope indicator (hereinafter called "VASI"), to maintain an altitude at or above the VASI glide slope until a lower altitude is necessary for a safe landing. The Regulation by its terms, however, does not prohibit normal bracketing maneuvers above or below the VASI glide slope, which are conducted for the purpose of remaining on the glide slope.

10. There has been installed on Runway 19 the VASI system. It establishes a visual glide path which descends at an angle of three degrees (3°) to the recommended touchdown point on Runway 19. To the pilot of an aircraft approaching too high (above the glide path) the VASI lights appear white; to the pilot of an aircraft approaching too low (below the glide path) the VASI lights appear red; when the aircraft is properly on the glide path the pilot sees a proper combination of red and white lights which blend to emanate a pinkish glow. The normal bracketing maneuvers authorized by Regulation 91.87(d) permit a pilot at times to go below the three degree (3°) VASI effective visual approach slope designated as Line D on

Julliard Exhibit A, but at no time is he authorized to go below the line designated as the VASI approach clearance surface designated as Line E on Julliard Exhibit A.

11. The VASI effective visual approach slope, at or above which (subject to bracketing maneuvers), the FAA regulations require and authorize an aircraft to approach to land on Runway 19, crosses the most distant limit of the City of Audubon Park at an elevation of 442 feet above ground level and crosses the City limit nearest the end of Runway 19 at an elevation of 282 feet above ground level.

12. 14 C.F.R. 91.117 provides that in approaching to land no person may operate an aircraft below a prescribed minimum descent altitude (MDA) unless, when he reaches that altitude on approach to the runway, the threshold of the runway or its approach lights are clearly visible to the pilot. If not clearly visible, the pilot is required to execute a missed approach procedure.

13. The diagram designated Julliard Exhibit A demonstrates that the MDA of 400 feet established by 14 C.F.R. 97.17 for Runway 19 is reached on the glide slope for landing on that runway at a point in the navigable airspace above Audubon Park 7,010 feet distant from Runway 19. A pilot who descends to the 400 foot altitude and then executes a missed approach maneuver because he cannot see the runway or the approach lights necessarily is authorized to fly below 750 feet.

15. FAA approved procedures for landing on Runways 1 and 29 at Standiford Field, as well as on Runway 19, authorize aircraft to execute circling approaches to those runways at elevations over Audubon Park lower than 600 feet, see Affidavit of Clay W. Hedges.

16. In 14 C.F.R. Part 77, which Part is designated "Objects Affecting Navigable Airspace," the FAA has established various surfaces of various elevations. The Regu-

lations provide that any objects constructed into the airspace above these elevations are obstructions to air navigation. The manner in which these surfaces cross the air above the City of Audubon Park is demonstrated on the diagram designated Julliard Exhibit A. In each instance these surfaces are far below the 750 foot elevation provided for in the ordinance.

17. Pilots operating the aircraft of Plaintiffs cannot comply with the FAA regulations and also comply with the provisions of the ordinance of the City of Audubon Park. In order for Plaintiffs' aircraft to make safe landings on Runway 19, pilots must fly in the FAA-regulated navigable airspace above the City of Audubon Park under the 750 foot elevation. Pilots cannot maintain an altitude of 750 feet while over the City of Audubon Park and then descend from that altitude to make a landing on Runway 19, since such rate of descent is too precipitous.

18. Runway 19 is orientated to the prevailing winds affecting Standiford Field and elimination of the use of this runway would seriously curtail air transportation to and from the Louisville metropolitan area. Any attempt to divert traffic from Runway 19 to other runways would create a situation hazardous to persons and property.

19. Each of the Plaintiff Air Lines would be caused great and irreparable damage if each complied with the provisions of the ordinance of the City of Audubon Park, and no one of Plaintiffs has an adequate remedy at law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1337.

2. The Amendment to the Answer and Counter Declaration tendered by counsel for Defendants at the hearing on the Motion for Summary Judgment is filed over the

objection of the attorneys for the Plaintiffs. Objections and Reply of Plaintiffs to said Amendment are also filed.

[1] 3. Paragraph 2 of the original Counter Declaration seeks to have this Court declare the nature and kind of ordinances the City of Audubon Park might in the future be authorized to adopt. The allegations of this Paragraph do not raise a justiciable issue and the Plaintiffs' motion to strike this Paragraph is sustained.

[2] 4. Paragraph 3 of the Amended Counter Declaration alleges that the Acts of Congress and the regulations of the FAA, Department of Transportation, establishing navigable airspace are void on the alleged theory that, prior to the establishment of navigable airspace, compensation must be paid for such airspace and that no compensation has been paid. This is not a "taking" case. The Plaintiff Air Lines use the navigable airspace established by Congress and by regulations of the FAA in approaching to land at Standiford Field, which field is under the control of the Louisville and Jefferson County Air Board. This Court cannot in this counter-action on behalf of a municipality declare an alleged taking of property of individuals to be compensable or unconstitutional. Paragraph 3 of the Amended Counter Declaration does not state facts upon which the Court can make a declaration of the rights of the parties.

[3] 5. The allegations of the Complaint and the allegations of Paragraph 1 of the Counter Declaration raise issues constituting an actual controversy concerning which pursuant to 28 U.S.C. § 2201 et seq., the Court will make a declaration of rights.

6. Congress has declared a public right of freedom of transit through the navigable airspace of the United States, 49 U.S.C. § 1304, and has defined navigable airspace to in-

clude airspace needed to insure safety in takeoff and landing of aircraft, 49 U.S.C. § 1301(24).

7. Congress has vested in the FAA, Department of Transportation, power to adopt rules and regulations to control the use of navigable airspace, 49 U.S.C. §§ 1303, 1348(a) and 1348(c).

8. As shown in the Fndings of Fact of the Court, the FAA has adopted regulations relative to navigable airspace which authorize and require Plaintiffs, when landing on Runway 19 at Standiford Field, to fly their aircraft in navigable airspace over the City of Audubon Park at altitudes under the elevation of 750 feet.

[4] 9. Enforcement of Ordinance No. 4, Series 1967, of the City of Audubon Park would constitute an intolerable and undue burden upon interstate and foreign commerce. Under the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution, the City of Audubon Park has no power to regulate interstate and foreign air traffic in the manner set forth in said ordinance.

10. Pursuant to its power set forth in the Commerce Clause the Congress has adopted valid statutes, and pursuant to such statutes the Federal Aviation Administration, Department of Transportation, has adopted valid regulations. Ordinance No. 4, Series 1967, of the City of Audubon Park is in direct conflict with said statutes and regulations. Under the Supremacy Clause (Art. VI, § 2) of the United States Constitution, such statutes and regulations are the supreme law of the land, and are binding on this Court, anything in the ordinances of the City of Audubon Park to the contrary notwithstanding.

11. The statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic. The City

of Audubon Park, therefore, has no power to enact Ordinance No. 4, Series 1967.

12. Said Ordinance is unconstitutional and void, and, therefore, is unenforceable.

13. Plaintiffs are entitled to a declaration of rights declaring the ordinance to be unconstitutional and to a permanent injunction in accordance with Paragraph 1 of the demand contained in Plaintiffs' Complaint.

UNITED STATES CONSTITUTION

[Commerce Clause, Art. I, § 8, Cl. 3]

The Cogress shall have power

* * * * * * *

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; . . .

[Supremacy Clause, Art. VI, Par. 2]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 USC § 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

JUDICIARY AND JUDICIAL PROCEDURE ACT.
[28 USC § 1301 et seq.]

28 USC § 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 USC § 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the

plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 USC § 1337. Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 USC § 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any

interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 USC § 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

FEDERAL AVIATION ACT OF 1958

[49 USC §1301 et seq.]

49 USC §1301 Definitions.

As used in this chapter, unless the context otherwise requires—

• • •

(24) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

49 USC §1303 Consideration of matters in public interest by Administrator.

In the exercise and performance of his powers and duties under this chapter the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation, facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

49 USC §1304 Public right of transit.

There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

49 USC §1348 Airspace control and facilities—Use of airspace.

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

* * *

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and

identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 USC §1486 Judicial review—Orders subject to review; petition for review.

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive judisdiction

to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of fact by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

49 USC §1508 Declaration of national sovereignty in airspace.

(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

THE FEDERAL AVIATION REGULATIONS
(Title 14, C.F.R.).

14 CFR §1.1 General Definitions.

As used in subchapters A through K of this chapter:

* * *

"Airport traffic area" means, unless otherwise specifically designated in Part 93 (New), that airspace within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating, extending from the surface up to, but not including, 2,000 feet above the surface.

* * *

"Navigable airspace" means airspace at and above the minimum flight altitudes prescribed by or under this chapter, including airspace needed for safe takeoff and landing.

14 CFR §11.75 Petitions for Revoking or Modifying Rules or Orders.

(a) Any interested person may petition to revoke or modify any rule or order covered by this subpart. Such a petition must be filed, in triplicate, with the Director and must clearly state the information, views and arguments the petitioner considers necessary to support the requested action and must clearly indicate the effect the action would have on the use of navigable airspace.

(b) A petition filed under this section is processed in the same manner as an original proposal, or in any other manner that the Director considers necessary or desirable.

14 CFR §71.11 Control Zones.

The control zones listed in Subpart F consist of controlled airspace extending upward from the surface of the

earth. A control zone may include one or more airports and is normally a circular area with a radius of five miles and any extensions necessary to include instrument approach and departure paths.

14 CFR, SUBPART F—Control Zones.

14 CFR §71.171 Designation.

The parts of airspace described below are designated as control zones.

* * *

Louisville, Ky.

Within a 5-mile radius of Standiford Field, Louisville, Ky., (Lat. 38°10'33" N, Long. 85°44'12" W); within a 5-mile radius of Bowman Field, Louisville, Ky.; (Lat. 38°13'40" N, Long. 85°39'45"W); within 2 miles either side of the Standiford Field ILS localizer NE course, extending from the Standiford 5-mile radius zone to the INT of the localizer NE course and the Louisville VORTAC 328° radial; within 2 miles either side of the Standiford Field ILS localizer SW course, extending from the Standiford 5-mile radius zone to the OM; within 2 miles either side of the Louisville VORTAC 301° radial, extending from the Standiford 5-mile radius zone to the VORTAC, and within 2 miles either side of the Louisville VORTAC 331° radial, extending from the Bowman Field 5-mile radius zone to the VORTAC.

14 CFR §77.13 Construction or alteration requiring notice.

(a) Except as provided in § 77.15, each sponsor who proposes any of the following construction or alteration shall notify the Administrator in the form and manner prescribed in § 77.17:

(1) Any construction or alteration of more than 200 feet in height above the ground level at its site.

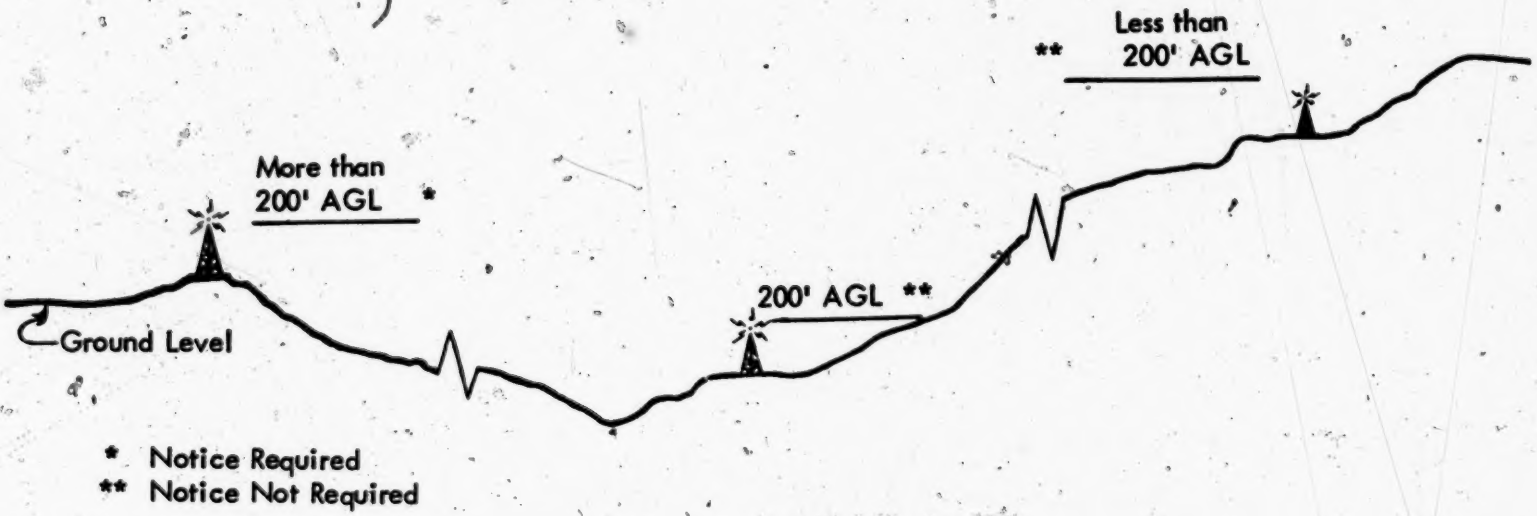
The Federal Aviation Regulations

(2) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:

(i) 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport with at least one runway more than 3,200 feet in length, excluding heliports and seaplane bases without specified boundaries, if that airport is either listed in the "Airport Directory" of the current Airman's Information Manual or is operated by a Federal military agency.

[See next two pages for copies of diagrams taken from official FARs.]

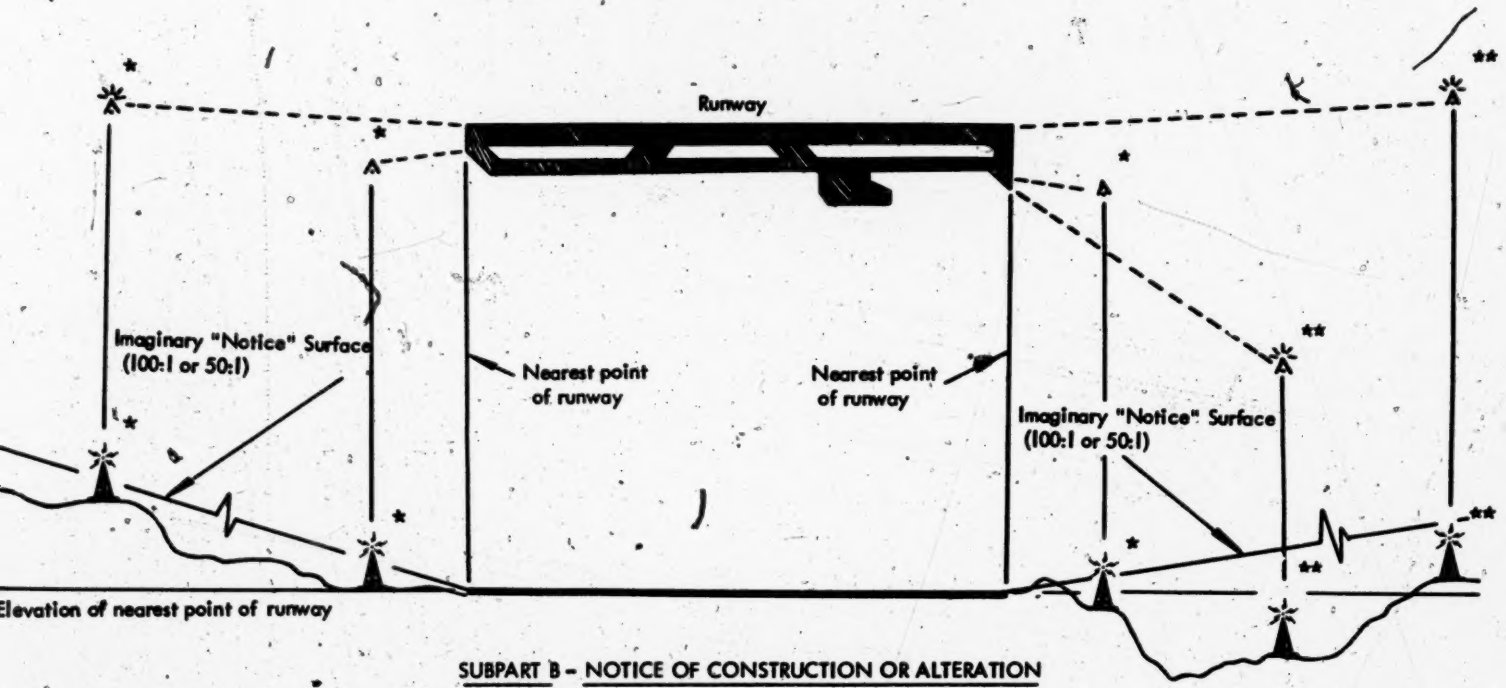
§77.13(a)(1) – Notice Requirement Anywhere



SUBPART B – NOTICE OF CONSTRUCTION OR ALTERATION

§77.13(a)(1) – A notice is required for any proposed construction or alteration that would be more than 200 feet in height above the ground level at its site.

Note: §77.13(a)(4) requires notice of any proposed construction or alteration on an airport listed in the Airport Directory of the current Airman's Information Manual.



SUBPART B – NOTICE OF CONSTRUCTION OR ALTERATION

§77.13 (a)(2) – A notice is required for any proposed construction or alteration that would be of greater height than an imaginary surface extending outward and upward at one of the following slopes –

(i) 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport with at least one runway more than 3,200 feet in length.

(ii) 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each airport with its longest runway no more than 3,200 feet in length.

* Notice required
** Notice not required

ote: Each airport must be listed in e "Airport Directory" of the urrent Airman's Information Manual, be operated by a Federal military gency. (Heliports and seaplane ses without specified boundaries e excluded).

14 CFR §77.23 Standards for determining obstructions.

(a) An existing object, including a mobile object, is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:

(1) A height of 500 feet above ground level at the site of the construction or alteration.

(2) A height that is 200 feet above ground level or above the established airport elevation, whichever is higher, within three statute miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 in length, and that height increases in the proportion of 100 feet for each additional statute mile of distance from the airport up to a maximum of 500 feet.

(3) A height that is 100 feet above ground level or 100 feet above the elevation of the approach end of the runway, whichever is higher, within an instrument approach area and within three statute miles of the runway end, and that height increases in the proportion of 25 feet for each additional statute mile of distance outward from the runway end up to a maximum of 250 feet and continuing at that height to a distance of ten statute miles from the runway end.

(4) A height which would increase an instrument approach minimum flight altitude.

* * *

(8) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25, § 77.27, §77.28, or §77.29; however, no part of the takeoff and landing area itself shall be considered an obstruction.

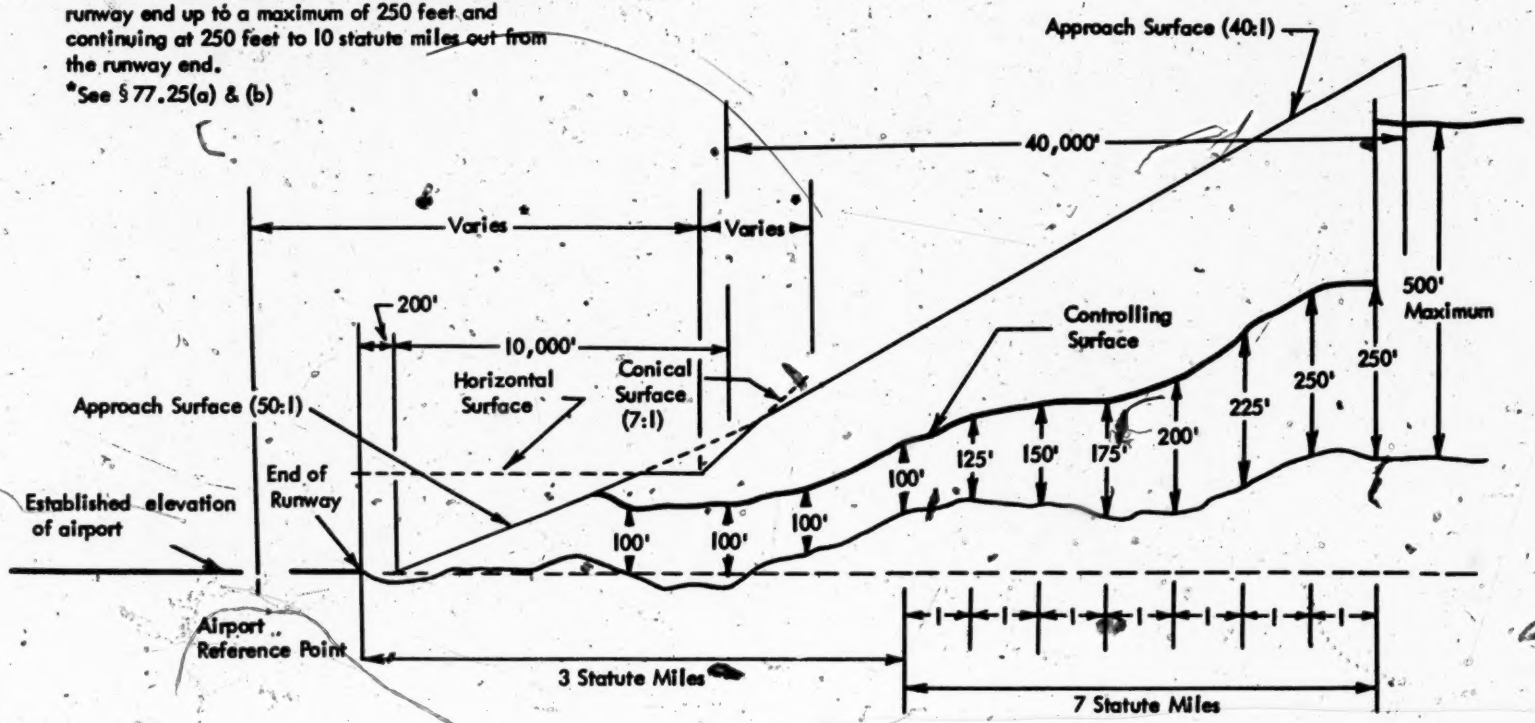
[See next page for copy of a diagram of § 77.23 Standards taken from official FARs.]

§77.23(a)(3) – Within Instrument Approach Areas

SUBPART C – OBSTRUCTION STANDARDS

§ 77.23(a)(3) – An object would be an obstruction to air navigation if of greater height than 100 feet above ground, or 100 feet above the elevation of the approach end of the runway, whichever is higher –
(a) within an instrument approach area, and
(b) within 3 statute miles of the runway end, and
(c) that height increases in proportion of 25 feet for each additional statute mile outward from the runway end up to a maximum of 250 feet and continuing at 250 feet to 10 statute miles out from the runway end.
***See § 77.25(a) & (b)**

(Note: An object would be an obstruction under §77.23(a)(4) at any height that would increase an instrument approach minimum flight altitude.)



The Federal Aviation Regulations

14 CFR §77.27 Civil airport imaginary surfaces related to runways.

The following civil airport imaginary surfaces are established for runways based upon their corrected lengths, whether the airport is constructed to "VFR Airports" standards, and whether the runway is an ILS runway, i.e., one equipped with a precision landing aid such as ILS, ground-controlled approach (GCA) or precision approach radar (PAR).

(a) Primary surface—a surface longitudinally centered on a runway and extending in length 100 feet beyond each end of a runway of an airport constructed to "VFR Airports" standards and 200 feet beyond each end of a runway of any other airport. The elevation of any point on the longitudinal profile of a primary surface, including the extensions, coincides with the elevation of the centerline of the runway, or extension, as appropriate. The width of a primary surface is 200 feet for runways of airports constructed to "VFR Airports" standards. For other airports the width is:

(1) 250 feet, for non-ILS runways, 3,200 feet or less in length.

(2) 400 feet, for non-ILS runways more than 3,200, but not more than 4,200 feet in length.

(3) 500 feet, for non-ILS runways more than 4,200 feet in length.

(4) 1,000 feet, for ILS runways.

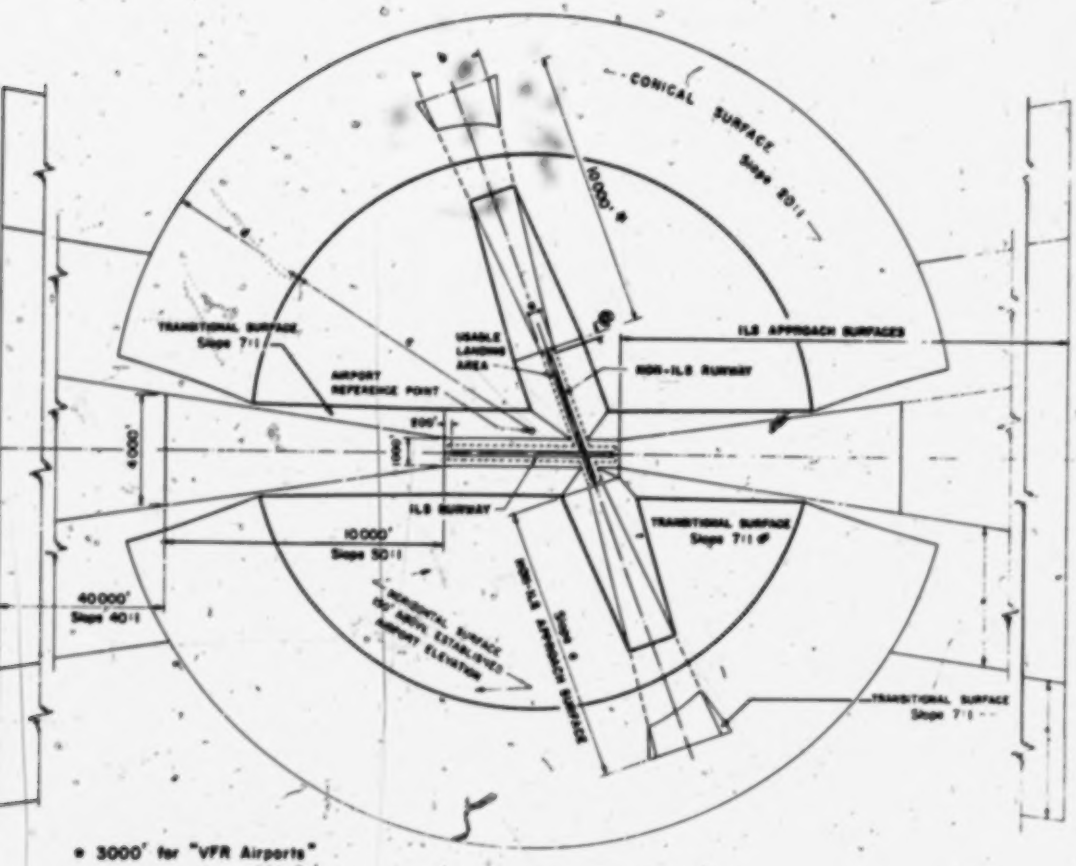
(b) ILS approach surface—a surface longitudinally centered on the extended centerline of an ILS runway, beginning at the end of the primary surface and extending outward and upward at a slope of 50 to 1 for a horizontal distance of 10,000 feet and at a slope of 40 to 1 for an ad-

ditional 40,000 feet. This surface is the width of the primary surface at the beginning and expands uniformly to a width of 16,000 feet at a distance of 50,000 feet from the end of the primary surface.

[See next page for a copy of a diagram of §77.27 standards taken from official FARs.]

§ 77.25 – Civil Airport Imaginary Surfaces related to airport reference points.

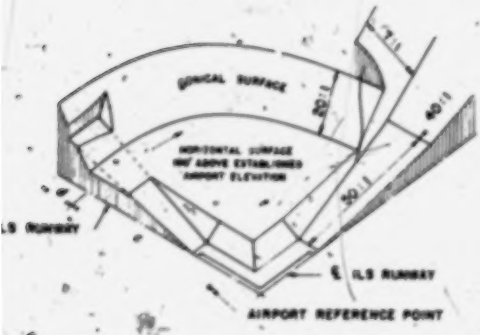
§ 77.27 – Civil Airport Imaginary Surfaces related to runways.



* 3000' for "VFR Airports"

\# Vertical for "VFR Airports"

@ 100' for "VFR Airports"



Longest runway	Distance in feet				Slope
	a	b	c	d	e
VFR type	200	500	5000	3000	20:1
3200' & less	250	2250	5000	3000	20:1
Over 3200' to 4200'	400	2400	7000	5000	40:1
Over 4200' to 6000'	500	2500	7000	5000	40:1
Over 6000' to 7500'	500	2500	11500	7000	40:1
Over 7500'	500	2500	13000	7000	40:1

14 CFR §91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR flight plan if he is operating in VFR weather conditions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

(c) Each pilot in command who deviates, in an emergency, from an ATC clearance or instruction shall notify ATC of that deviation as soon as possible.

(d) Each pilot in command who (though not deviating from a rule of this subpart) is given priority by ATC in an emergency, shall submit, within 48 hours after the emergency, a detailed report of the emergency to the nearest FAA Regional Office.

14 CFR §91.87 Operation at airports with operating control towers.

(a) **General.** Unless otherwise authorized or required by ATC, each person operating an aircraft to, from, or on an airport with an operating control tower shall comply with the applicable provisions of this section.

(b) **Communications with control towers operated by the United States.** No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land

if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with §91.127.

* * *

(d) **Minimum Altitudes.** When operating to an airport with an operating control tower, each pilot of—

* * *

(2) A turbine-powered airplane or a large airplane approaching to land on a runway being served by an ILS, shall, if the airplane is ILS equipped, fly that airplane at an altitude at or above the glide slope between the outer marker (or the point of interception with the glide slope, if compliance with the applicable distance from clouds criteria requires interception closer in) and the middle marker; and,

(3) An airplane approaching to land on a runway served by a visual approach slope indicator, shall maintain an altutude at or above the glide slope until a lower altitude is necessary for a safe landing.

However, subparagraphs (2) and (3) of this paragraph do not prohibit normal bracketing maneuvers above or below the glide slope that are conducted for the purpose of remaining on the glide slope.

* * *

(h) **Clearances required.** No pilot may, at an airport with an operating control tower, taxi an aircraft on a runway, or takeoff or land an aircraft, unless he has received an appropriate clearance from ATC. A clearance to "taxi to" the runway is a clearance to cross any intersecting runways but is not a clearance to "taxi on" the assigned runway.

14 CFR §91.115 ATC clearance and flight plan required.

No person may operate an aircraft in controlled airspace under IFR unless—

(a) He has filed an IFR flight plan; and

(b) He has received an appropriate ATC clearance.

14 CFR §91.117 Limitations on use of instrument approach procedures (other than Category II).

(a) **General.** Unless otherwise authorized by the Administrator, each person operating an aircraft using an instrument approach procedure prescribed in Part 97 of this chapter shall comply with the requirements of this section. This section does not apply to the use of Category II approach procedures.

(b) **Descent below MDA or DH.** No person may operate an aircraft below the prescribed minimum descent altitude or continue an approach below the decision height unless—

(1) The aircraft is in a position from which a normal approach to the runway of intended landing can be made; and

(2) The approach threshold of that runway, or approach lights or other markings identifiable with the approach end of that runway, are clearly visible to the pilot.

If, upon arrival at the missed approach point or decision height, or at any time thereafter, any of the above requirements are not met, the pilot shall immediately execute the appropriate missed approach procedure.

14 CFR §97.17 (32 FR 11, 319; August 4, 1967).

ILS STANDARD INSTRUMENT APPROACH PROCEDURE

Bearings, headings, courses and radials are magnetic. Elevations and altitudes are in feet MSL. Ceilings are in feet above airport elevation. Distances are in nautical miles unless otherwise indicated, except visibilities which are in statute miles.

If an instrument approach procedure of the above type is conducted at the below named airport, it shall be in accordance with the following instrument approach procedure, unless an approach is conducted in accordance with a different procedure for such airport authorized by the Administrator of the Federal Aviation Agency. Initial approaches shall be made over specified routes. Minimum altitutes shall correspond with those established for en route operation in the particular area or as set forth blow.

Transition				Ceiling and visibility minimums			
From—	To—	Course and distance	Minimum altitude (feet)	Condition	2-engine or less		More than 2-engine, more than 65 knots
					65 knots or less	More than 65 knots	
Louisville VOR..	Harbor Int.	Direct	2200	T-dn	300-1	300-1	200-½
Nabb VOR.....	Harbor Int (final)..	Direct	2200	C-dn	600-1	600-1	600-1½
Henryville Int...	Harbor Int	Via LOU, R-332°. and SDF.		S-dn-19*.	400-1	400-1	400-1
		LOC crs.....	2600	A-dn	800-2	800-2	800-2

Radar available.

Procedure turn E side of Ncrs, 101° Outbnd, 190° Inbnd, 2200′ within 10 miles N of Harbor Int.

Minimum altitude over Harbor Int on final approach crs, 2200′; over Cave Hill Int, 1500′.

Crs and distance, Harbor Int to Runway 19, 190°—5.3 miles; Cave Hill Int to Runway 19, 190°—3 miles.

If visual contact not established upon descent to authorized landing minimums or if landing not accomplished within 5.3 miles after passing Harbor Int, make a right-climbing turn to 2500′ on a heading of 260°, intercept R 279°, LOU VOR and proceed to Corydon Int, hold W, 1-minute right turns, 099° Inbnd.

Alternate missed approach: Climb to 2100′ on S crs of ILS to SD LOM, hold N, 1-minute right turns, 190° Inbnd.

NOTE: This procedure authorized only for aircraft equipped to receive ILS and VOR simultaneously.

*400-3 4 authorized for Runway 19 with operative HIRL, except for 4-engine turbojets.

City, Louisville; State, Ky.; Airport name, Standiford Field; Elev., 497; Fac. Class., ILS, Ident., I-SDF; Procedure No. LOC(BC) Runway 19, Amdt. 7; Eff. date, 26 Aug. 67; Sup. Amdt. No. ILS-19 (back crs) Amdt. 6; Dated, 10 Apr. 65.

[See next page for copy of the Approach Chart from Eastern Airlines' Flight Operations Manual, on which the above information is consolidated and presented in a more comprehensible form.]

Jeppesen Approach Chart — AUG 18-67 (11-2)

LOUISVILLE, KY.

STANDIFORD Tower 120.3 122.7G 126.2 257.8

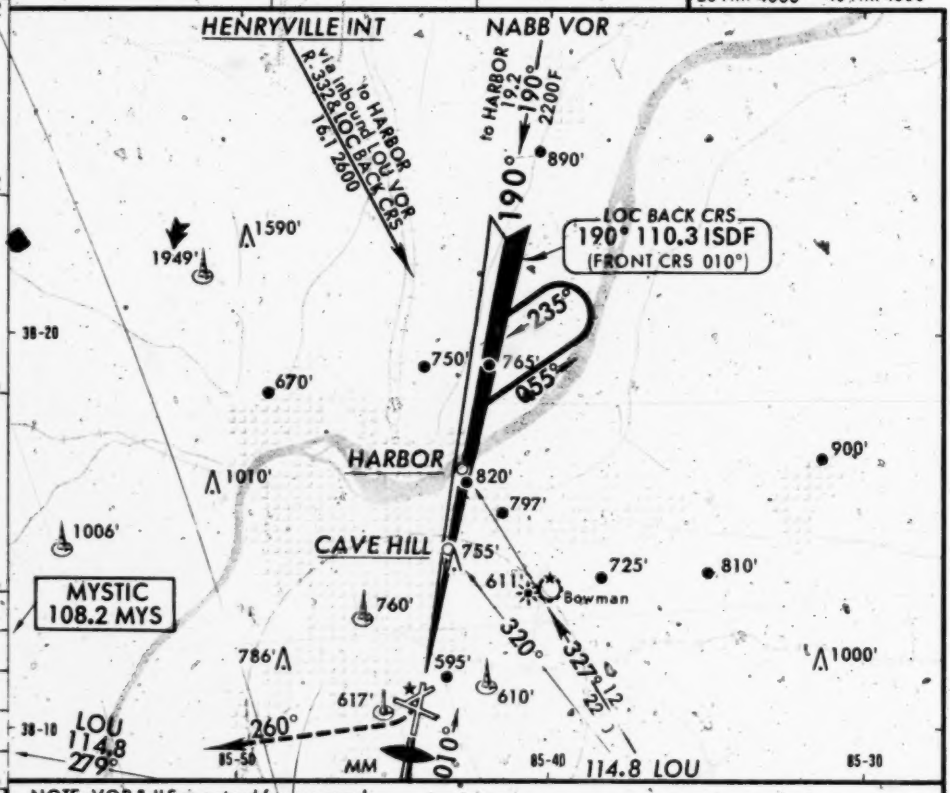
Apt. Elev. 497'

Var. 01°E Eff Aug 26

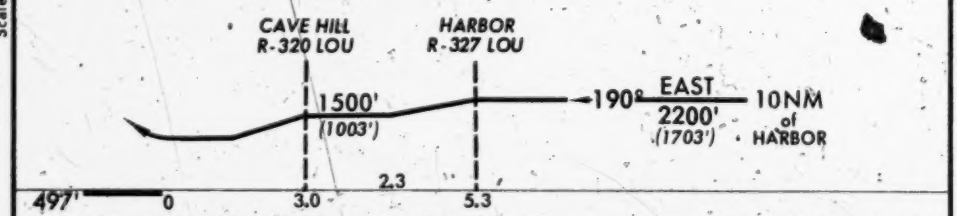
STANDIFORD LOC (BACK CRS) Rwy 19

LOC 110.3 ISDF

Approach (R)		Departure (R)		Ground		SAFE ALTITUDE
124.5	343.8	119.0	327.0	121.7	348.6	20 NM 4000' 40 NM 4000'



NOTE: VOR & ILS required for approach.



PULL UP: turn RIGHT to 2500 feet on 260° to intercept and proceed outbound on LOU VOR R-279 to CORYDON INT (24.0 DME or MYS VOR R-022), hold WEST on LOU VOR R-279, RIGHT turns, or as directed.

SCHEDULED AIR CARRIER & PRIVATE OPERATORS STRAIGHT-IN RWY 19	LANDING MINIMA FAA AIRCRAFT	ALL OPERATORS CIRCLING	NON-SCHEDULED A.C. ST-IN RWY 19
400-3/4	P 1&2 Eng to 65 Kt; R 1&2 Eng over 65 Kt; O P 3 & 4 Engine	600-1	400-1
	J 1 & 2 Engine; J 3 Engine	600-1½	
400-1	E T 4 Engine	600-2	400-1

Ground speed - knots	60	80	100	120	140	160	180	200
HARBOR to Pull-up	5.3	5:18	3:59	3:11	2:39	2:17	1:59	1:46	1:35

CEILING/ALTITUDE CONVERSION							
QFE	400	600	800				
QNH	897	1097	1297				

CHANGES: Henryville Int trans; altitude over Cave Hill.

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The Federal Aviation Regulations

14 CFR §121.133 Preparation.

(a) Each domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations.

(b) Each supplemental air carrier and commercial operator shall prepare and keep current a manual for the use and guidance of flight, ground operations, and management personnel in conducting its operations.

THE ORDINANCE

CITY OF AUDUBON PARK, KENTUCKY

ORDINANCE No. 4, SERIES 1967

AN ORDINANCE CONCERNING HEALTH AND SAFETY ESTABLISHING A MINIMUM HEIGHT FOR OPERATION OF AIRCRAFT OVER THE CORPORATE LIMITS OF THE CITY OF AUDUBON PARK, KENTUCKY, PROVIDING ENFORCEMENT PROVISIONS THEREFOR AND ESTABLISHING PENALTIES FOR VIOLATIONS.

The Board of Trustees of the City of Audubon Park does ordain as follows:

SECTION ONE

It shall be unlawful for any person, agency, corporation or business entity to fly, operate, or in any manner participate or engage in the flight or operation of any aircraft over the corporate limits of the City of Audubon Park at a height of less than seven hundred and fifty (750) feet.

SECTION TWO

Not by way of limitation but for purposes of explicitness, definiteness and certainty the terms person, agency, corporation or business entity shall include any airport, airboard or governing body thereof, from which or to which any aircraft violating Section One hereof first makes landing or takeoff after or prior to such violation. Said airport, airboard or governing body thereof shall be as equally, concurrently and jointly guilty of violation of Section One hereof as the owner and operator of the violating aircraft.

SECTION THREE

Section One shall not apply to passengers of said aircraft or to violations occasioned by bona fide emergencies.

SECTION FOUR

Any person, agency, corporation or business entity guilty of violation of this Ordinance shall be fined one hundred ($100.00) dollars for each offense.

SECTION FIVE

This Ordinance shall take effect from, on and after the date of its passage, posting and publication.

(s) Geo. W. Stebbins
Chairman, Board of Trustees,
City of Audubon Park, Kentucky

ATTEST:

(s) Martha S. Miller,
Clerk, Board of Trustees
City of Audubon Park, Kentucky

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

No. 268,713

H. L. BRUNSON, et al., - - - - Petitioners.

JUDGMENT.

This cause coming on to be heard and it appearing to the Court from the records herein that due notice of the filing of the petition herein and the object thereof has been published in two issues of the Louisville Times on the 22nd and 24th days of March, said newspaper being published in and of general circulation in Jefferson County, Kentucky, and it further appearing to the Court, and the Court being satisfied from the verified petition herein that the population within the boundary described in said petition is sufficient to meet the requirements of law in such case, and no objection having been interposed herein, it is now ordered, adjudged and decreed:

1. That a town by the name of Audubon Park be and is hereby established as a municipal corporation of the sixth class within the following described boundary as more fully shown by a map filed with the petition herein, said boundary being described as follows, to-wit:

BEGINNING at a point in the East side of Preston Street Road 200 feet more or less North of the North side of the intersection of Audubon Parkway and Preston Street Road, running thence in a Southerly direction along the Eastern side of Preston Street Road 850 feet more or less to the intersection of the Southern Railway right of way and Preston Street Road; thence along the Northerly line of the Southern Railway right of way 1350 feet more or less to the intersection of the

Southern Railway right of way and the Southerly line of Cardinal Drive; thence with the Southerly line of Cardinal Drive in an Easterly direction 2600 feet more or less to a point 280 feet Easterly of the Easterly line of Dove Road at the intersection with Cardinal Drive; thence in a Northerly direction in a line parallel with the Easterly line of lot #287 of Audubon Park, a plat of which is recorded in plat and subdivision book 8, pages 143-144-145, in the office of the Clerk of the County Court, Jefferson County, Kentucky, 250 feet more or less to a point in the Southerly line of lot #60, block 208 in said Audubon Park, 283 feet more or less East of the East line of Dove Road; thence in a Southwesterly direction along the Southerly line of said lot 60, block 208, 283 feet more or less to a point in the Easterly line of Dove Road; thence with the Easterly line of Dove Road, in a Northwesterly direction 900 feet more or less to a point at the Northeast corner of the intersection of Dove Road and Chickadee Road; thence along the Easterly line of Chickadee Road 1575 feet more or less to a point at the Southeast corner of the intersection of Chickadee Road and Hess Lane; thence along the Southerly line of Hess Lane 725 feet more or less to a point where said line would be intersected by the back lines of lots 187 to 190A, inclusive, Block 111, Audubon Park, if extended in a Northerly direction; thence with said back lines as extended, in a Southerly direction 625 feet more or less to a point in the back line of said lot 187, block 111, Audubon Park, where said line is met by the back lines of lots 1A; 2 to 18 inclusive, block 111, Audubon Park; thence with said back lines in a Southwesterly direction 1725 feet more or less to a point of beginning.

Judgment

2. There are hereby appointed as the Board of Trustees of said town the following named persons resident therein, to-wit: H. L. Brunson, Lelia R. Chandler, A. A. Hermes, Chas. T. Lanham and Thos. F. Gordon; as Police Judge thereof, John J. Hession; as Marshal thereof, Henry Battle; and as Assessor thereof, A. R. Remmers, each of which said trustees and officers shall hold their respective offices until the next general election at which officers for cities and towns may be elected and until such successors have been elected and qualified.

The qualification of said officers shall be in the manner provided by law by taking the respective oaths of office and executing the bonds and obligations prescribed by law, a record of which shall be entered upon the records of said town.

(s) Gilbert Burnett,
Judge.

Dated April 18, 1941
ENT. JUDGT. BOOK No. 93

Page 183 Attest:
John A. Alsmiller, Clerk
By M. M. Shaughnessy,
Deputy Clerk

A Copy
Attest: Elmer N. Carrell, Clerk
Jefferson Circuit Court
Louisville, Kentucky
By W. Morris, D. C.

Judgment

Commonwealth of Kentucky,
County of Jefferson } SS. Official Certificate

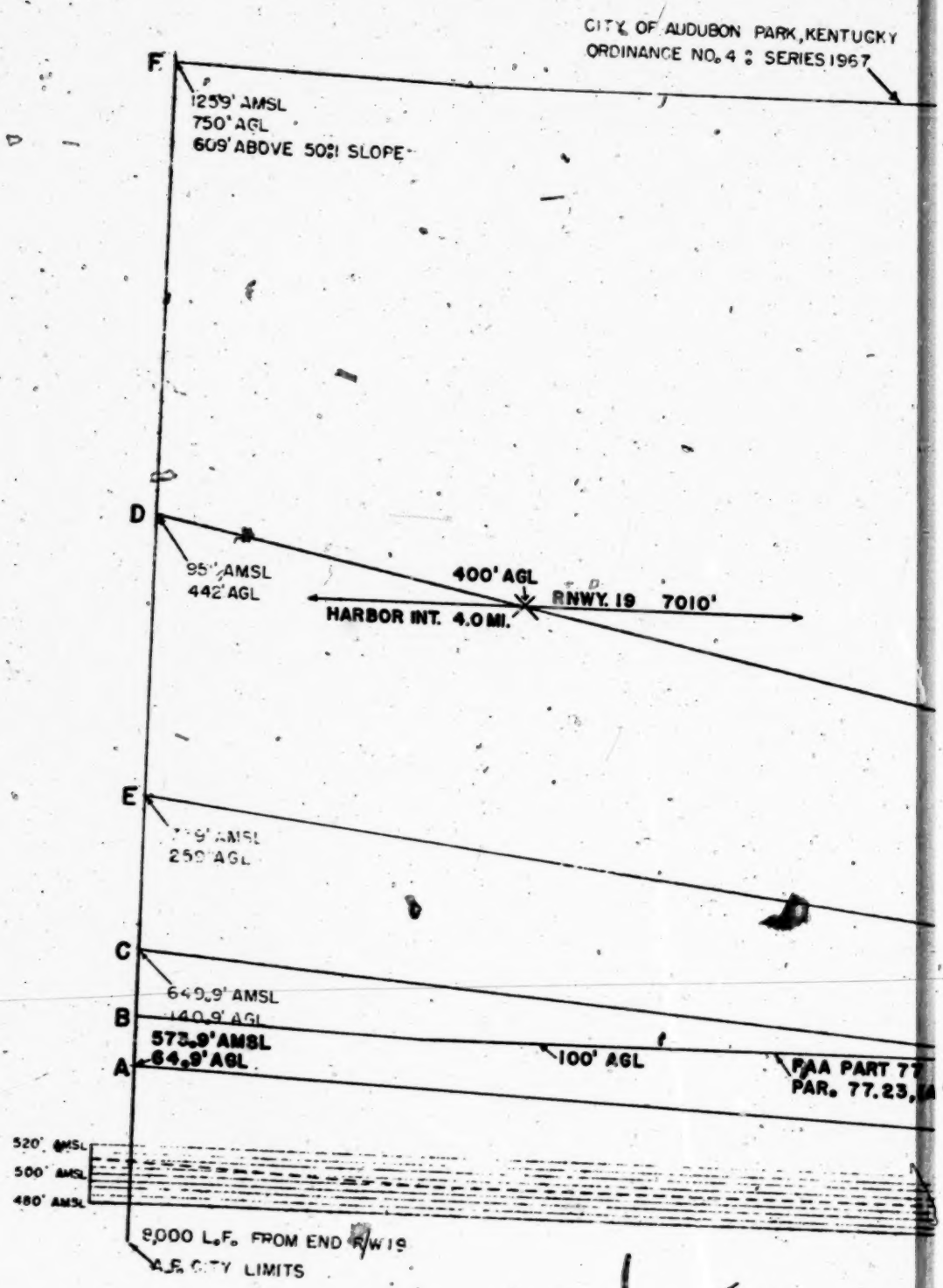
I, ELMER N. CARRELL, Clerk of Jefferson Circuit Court, in and for the Commonwealth and County aforesaid do hereby certify that the attached is a full, true and correct copy of Judgment, entered in Court, April 12, 1941, and noted on Civil Docket in action #268-713, wherein, H. L. Brunson, Et Al. v. On Petition as appears of record in my office.

(s) Gilbert Burnett, Judge.

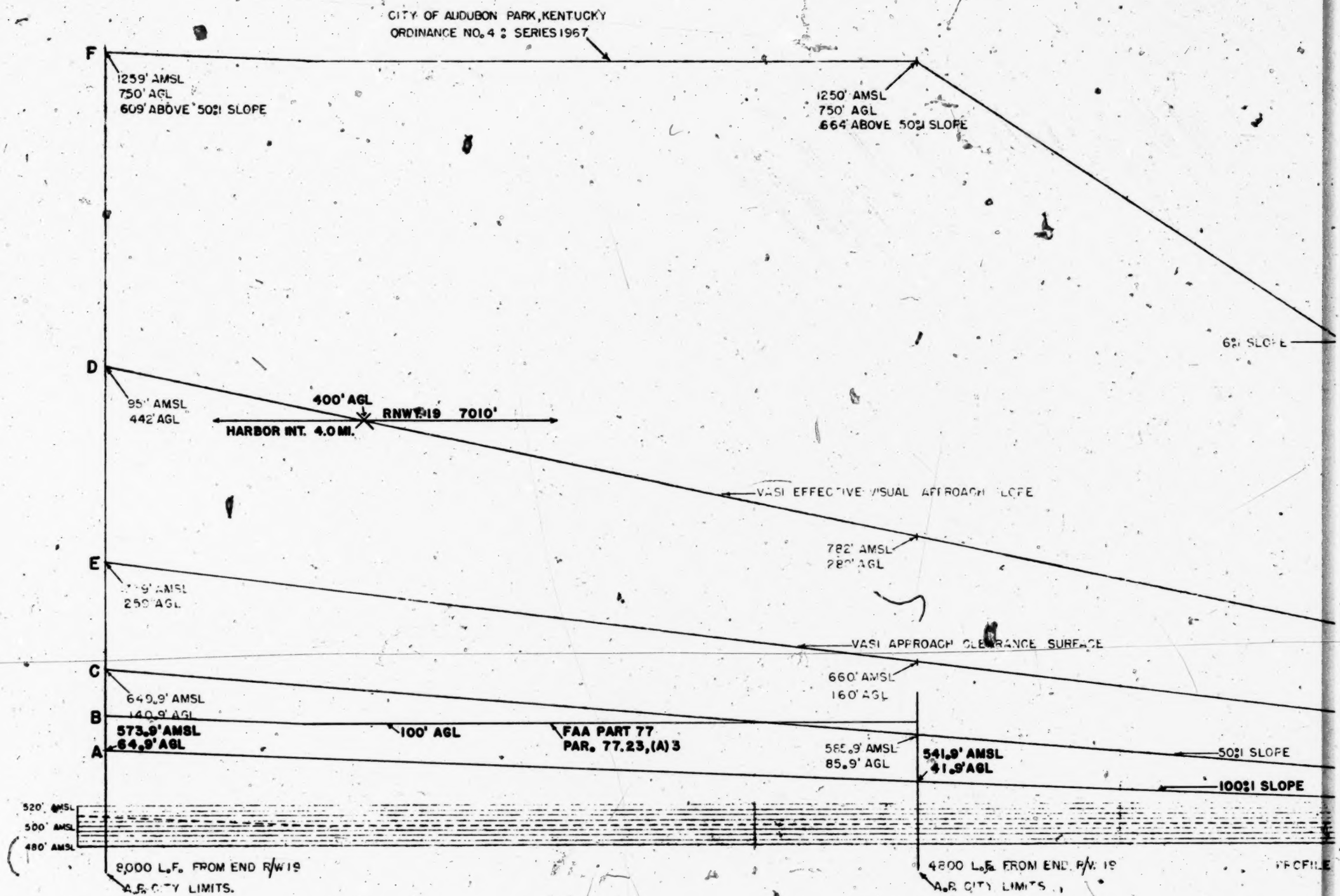
In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court aforesaid, at the city of Louisville, this 19th day of June 1969.

(s) Elmer N. Carrell, Clerk.

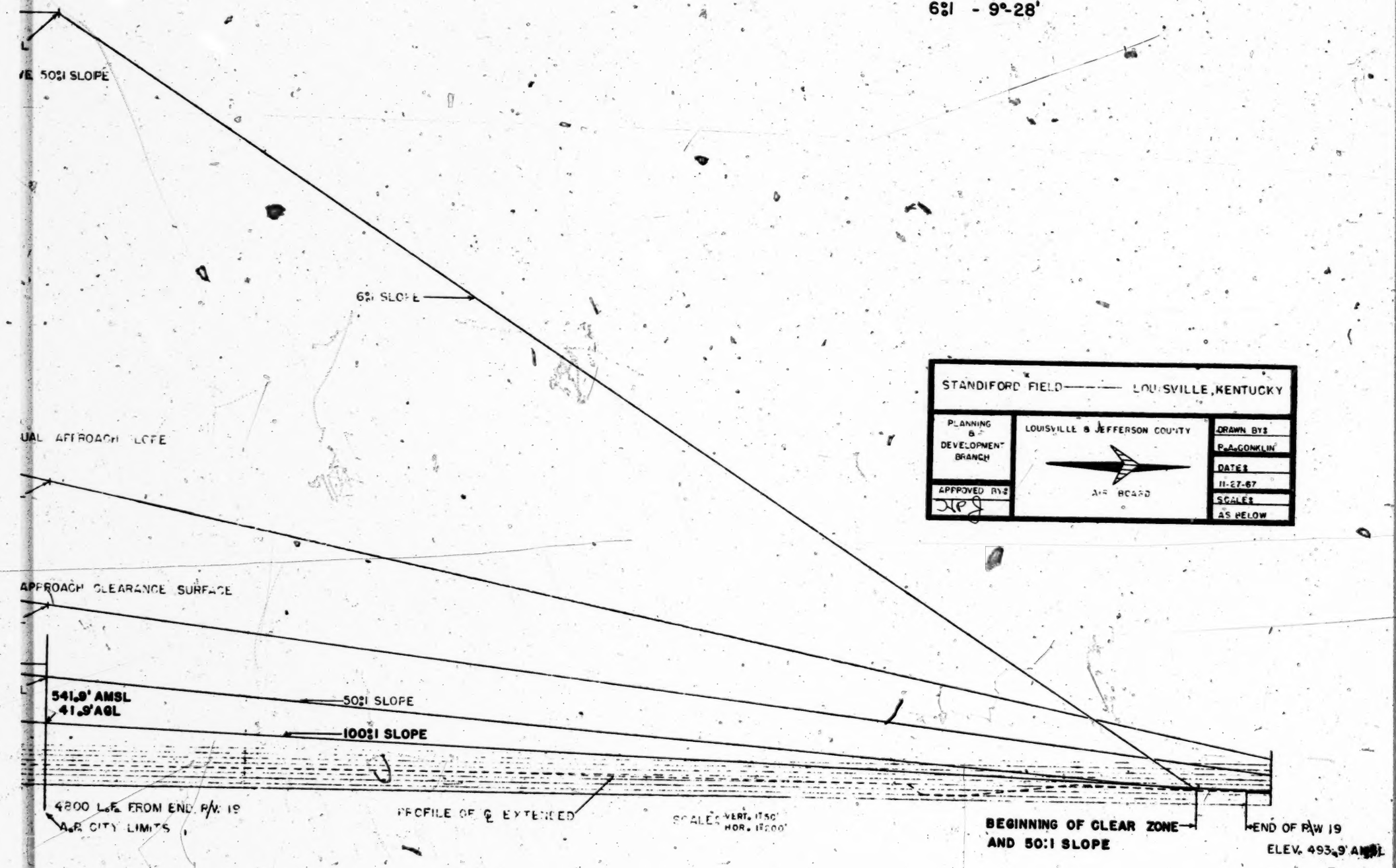
JULLIARD EXHIBIT "A"



JULLIARD EXHIBIT "A"



VEVAS - 3° = 19:1
VACS - 1°-45' = 33:1
50:1 - 1°-09'
100:1 - 0°-34'
6:1 - 9°-28'



STANDIFORD FIELD —— LOUISVILLE, KENTUCKY

PLANNING & DEVELOPMENT BRANCH	LOUISVILLE & JEFFERSON COUNTY AIR BOARD	DRAWN BY: P.A. CONKLIN
APPROVED BY:		DATE: 11-27-67
		SCALE: AS BELOW